

December 12, 2003

**VIA HAND DELIVERY**

Mr. Thomas M. Dorman  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40602

RE: Southeast Telephone, Inc.  
Case No. 2003-00115

Dear Mr. Dorman:

Enclosed for filing please find an original and eleven (11) copies of the Petition for Confidential Treatment of Kentucky ALLTEL's Post Hearing Brief in the above-referenced case. A redacted copy of the Post Hearing Brief is attached to ALLTEL's Petition for Confidential Treatment. An unredacted copy is being filed under seal in the enclosed envelope.

Please return a date-stamped copy of the redacted version to me in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter. If you have any questions, please do not hesitate to call.

Sincerely,

  
James H. Newberry, Jr.

Enclosures

Petition and Redacted Post Hearing Brief (original and eleven copies)  
Petition and Unredacted Post Hearing Brief (under seal)  
SASE



Mr. Thomas Dorman  
December 12, 2003  
Page 2

cc: Jonathon N. Amlung, Esq. (w/enclosures)  
Steve Rowell, Esq. (w/enclosures)  
Amy Dougherty, Esq. (w/enclosures)

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**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

**Petition of Southeast Telephone, Inc. for )**  
**Arbitration of Certain Terms and )**  
**Conditions of the Proposed Agreement with )**  
**Kentucky ALLTEL, Inc., Pursuant to the ) Docket No. 2003-00115**  
**Communications Act of 1934, as amended )**  
**By the Telecommunications Act of 1996 )**

**PETITION FOR CONFIDENTIAL TREATMENT OF**  
**KENTUCKY ALLTEL POST HEARING BRIEF**

Kentucky ALLTEL, Inc. ("Kentucky ALLTEL") moves the Kentucky Public Service Commission ("Commission") pursuant to K.R.S. §61.878(1)(c)(1) and 807 KAR 5:001, Section 7 to accord confidential treatment to specifications and upgrade estimates with respect to SETel's switch (collectively, the "Switch Specifications") as discussed in Kentucky ALLTEL's Post Hearing Brief ("Brief"), and in support thereof states the following:

1. The Commission conducted a final hearing in this matter on November 13, 2003.
2. In order to adequately address its position with respect to the fact that SouthEast Telephone, Inc. ("SETel") is not impaired as SETel has self provisioned a local service capable switch, Kentucky ALLTEL prepared Section II.C. of the Brief which addresses SETel's Switch Specifications. Kentucky ALLTEL previously filed with the Commission under confidential seal the Switch Specifications as exhibits to its Supplemental Data Requests.
3. Kentucky ALLTEL devoted substantial resources to compiling the underlying data making up the Switch Specifications, which information includes the manufacturer's

proprietary information and upgrade estimates and was revealed to Kentucky ALLTEL on a proprietary basis from the manufacturer.

4. The Switch Specifications are treated as highly confidential by Kentucky ALLTEL and its affiliates. The Switch Specifications contain information that has not been released publicly and is disclosed internally within Kentucky ALLTEL on a need-to-know basis only and to the Commission only when required and only pursuant to a confidentiality agreement or enforceable order according the information confidential treatment. Kentucky ALLTEL employs all reasonable measures to protect the confidentiality of the proprietary information in the Switch Specifications and to guard against inadvertent, unauthorized disclosure. Further, Kentucky ALLTEL is not entitled to publish such competitively sensitive information on behalf of SETel's switch manufacturer.

4. K.R.S. §61.878(1)(c)(1) provides in pertinent part:

The following public records are excluded from the application of ...[the Open Records Act] and shall be subject to inspection only upon order of a court of competent jurisdiction ...

(c)1. ...records confidentially disclosed to an agency or required by an agency to disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.

5. Public disclosure of the Switch Specifications would provide other entities an unfair advantage by affording them access to manufacturer proprietary information which was revealed to Kentucky ALLTEL only upon its execution of a protective agreement. Such information contained in the Switch Specifications is generally considered confidential and proprietary in the telecommunications industry.

6. The Switch Specifications are also protected from disclosure pursuant to K.R.S. §61.878(1)(c)(2)(c) as confidential and proprietary records disclosed to the Commission in conjunction with the regulation of a commercial enterprise.

7. Filed with this Petition as Attachment 1 is one copy of the Brief that includes those portions of the Switch Specifications that are confidential. Also filed are ten copies of the Brief with the confidential Switch Specification information redacted.

8. Due to the highly confidential nature of the Switch Specifications as set forth herein, any diskette containing an electronic form of the unredacted Switch Specifications should not be duplicated under any circumstance and should be viewed only from the original diskette.

WHEREFORE, Kentucky ALLTEL respectfully requests that the Switch Specifications be accorded confidential treatment and be placed in the confidential files of the Commission, that viewing of any diskette containing the unredacted Switch Specifications be restricted to only Commission and Staff involved herein, that no party herein including Staff be permitted to duplicate any diskette containing the unredacted Switch Specifications, and that Kentucky ALLTEL be accorded all other relief to which it may be entitled.

Dated: December 12, 2003.

Respectfully submitted,

**KENTUCKY ALLTEL, INC.**

By: 

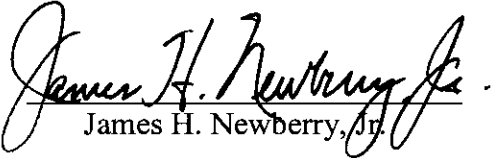
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the Petition for Confidential Treatment and the attached Post Hearing Brief shown on pages 5 through 60 were served on the following by first class mail, postage prepaid:

Hon. Jonathon N. Amlung  
Counsel for SouthEast Telephone, Inc.  
1000 Republic Building  
429 W. Muhammad Ali Blvd.  
Louisville, KY 40202

This 12<sup>th</sup> day of December, 2003.

  
James H. Newberry, Jr.

**KENTUCKY ALLTEL, INC.**

**PETITION FOR CONFIDENTIAL TREATMENT**  
**ATTACHMENT 1**

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**Petition of Southeast Telephone, Inc. for     )**  
**Arbitration of Certain Terms and             )**  
**Conditions of the Proposed Agreement with )**  
**Kentucky ALLTEL, Inc., Pursuant to the     )**  
**Communications Act of 1934, as amended    )**  
**by the Telecommunications Act of 1996       )**

**Docket No. 2003-00115**

**POST HEARING BRIEF**

**ON BEHALF OF KENTUCKY ALLTEL, INC.**

Filed December 12, 2003

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## **I. INTRODUCTION**

On August 7, 2003, SouthEast Telephone, Inc. ("SETel") filed a Petition for Arbitration ("Petition"), and Kentucky ALLTEL, Inc. ("Kentucky ALLTEL") filed a Response and Petition for Suspension or Modification on September 2, 2003 ("Response" and "Fewer than 2% Petition"). The parties met for an informal conference on October 15, 2003, after which Kentucky ALLTEL propounded to SETel its First Set of Interrogatories and First Request for Production of Documents on October 22, 2003 ("Discovery"). On October 27, 2003, the Kentucky Public Service Commission ("Commission") issued an Order setting a procedural schedule, requiring parties to prefile direct testimony by November 5, 2003, and limiting hearing testimony to cross examination or redirect and rebuttal testimony.<sup>1</sup>

On October 29, 2003, Kentucky ALLTEL filed a motion to extend the time for filing direct testimony and to require SETel to respond to the Discovery. By Order entered November 3, 2003, the Commission determined that this proceeding is governed by the Telecommunications Act of 1996 ("the Act") and that a finding of impairment is mandated by §251(d)(2) of the Act before an incumbent local exchange carrier ("ILEC") may be required to provide unbundled network elements ("UNEs"). The Commission ordered SETel to respond to Discovery questions one, two, five, six, eighteen, fifty-seven, and fifty-eight, but denied Kentucky ALLTEL's request with respect to the remaining Discovery despite its determination that a finding of impairment was relevant.<sup>2</sup> The parties' direct testimony, last best offers, and statements of resolved and unresolved issues were to be filed by 10:00 a.m. on November 10, 2003.<sup>3</sup>

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<sup>1</sup> October 27 Order at 2.

<sup>2</sup> November 3 Order at 4.

<sup>3</sup> *Id.* at 5.

In compliance with the Commission's Orders, Kentucky ALLTEL timely filed its last best offer, statement of issues, and direct testimony on behalf of five witnesses, who addressed all unresolved issues identified by the parties. SETel filed, but not by the 10:00 a.m. deadline, its last best offer, statement of issues, and direct testimony of one witness, who addressed only pricing issues.

ALLTEL now files this Post Hearing Brief in support of, among other things, its positions with respect to the following issues:

- Arbitration Issue No. 7: Pursuant to the applicable order of the Federal Communications Commission ("FCC"), Kentucky ALLTEL is not required to pay reciprocal compensation to SETel with respect to traffic that originates on Kentucky ALLTEL end users and is delivered to SETel for delivery to an Internet service provider ("ISP").
- Arbitration Issue No. 12: With respect to any Kentucky ALLTEL end office for which SETel usage exceeds a DS1 capacity, SETel shall, consistent with industry practice and its interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"), be required to obtain or install direct trunks.
- Arbitration Issue No. 13: SETel is not impaired and thus is not entitled to access to certain Kentucky ALLTEL UNEs, specifically unbundled local switching ("ULS") and transport. Further, Kentucky ALLTEL is entitled to suspension or modification pursuant to §251(f)(2).
- Arbitration Issue No. 16: If Kentucky ALLTEL is required to provide UNE-P, then it should be permitted to charge for toll usage on UNE-P.
- Arbitration Issue No. 17: With respect to pricing, Kentucky ALLTEL should charge the previously-approved Verizon South, Inc.'s rates until such time as Kentucky ALLTEL-specific rates are established.

Overall, the evidence presented in this matter clearly proved that under all applicable federal authorities, SETel (who is not a fledgling new entrant and is instead a sophisticated telecommunications carrier who has self-provisioned a local service capable switch) is not impaired with respect to unbundled local switching and transport and therefore must be denied access to such elements. Even if SETel were impaired, which it clearly is not, the Commission must suspend Kentucky ALLTEL's unbundled switching obligations and further reductions in UNE rates pursuant to §251(f)(2) of the Act. With respect to UNE rates and

applicable resale discount, the Commission should affirm its prior approval of Kentucky ALLTEL's predecessor's rates until such time as Kentucky ALLTEL specific rates are established. Additionally, it is unrefuted that Internet traffic should be exchanged on a bill-and-keep basis and that the appropriate capacity threshold for installing direct trunks into a Kentucky ALLTEL end office is a DS1. Finally, if UNE-P could be lawfully required of Kentucky ALLTEL, which the evidence has shown it cannot, SETel should be assessed usage charges for UNE-P. Thus, the evidence presented herein has shown that a decision in favor of Kentucky ALLTEL's position with respect to each of these issues is appropriate, and any contrary decision could only be the result of the denial of due process Kentucky ALLTEL experienced in this proceeding.

## **II. SETEL IS NOT IMPAIRED AS TO UNBUNDLED LOCAL SWITCHING AND TRANSPORT.**

### **A. APPLICABLE LAW**

The obligations of LECs generally with respect to interconnection are imposed by the Act.<sup>4</sup> Congress enacted the Act to promote the provision of advanced telecommunications services through competition in the telecommunications industry while, at the same time, preserving and fostering universal service. In particular, with respect to promoting market entry, Congress adopted multiple sets of interconnection obligations with varying levels of requirements applicable to different types of carriers.<sup>5</sup>

Section 251(c) of the Act sets forth interconnection obligations, which apply only to ILECs and which are the most onerous requirements. Specifically, §251(c) requires ILECs to (1) negotiate interconnection terms and conditions with potential competitors according to

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<sup>4</sup> See, 47 U.S.C. §§251 and 252.

specific requirements; (2) provide specific network functions and elements according to specific unbundling requirements and other terms and conditions; (3) allow competitors to collocate their transmission facilities in its ILEC facilities; (4) remove all restrictions on resale (to allow resale) and allow other carriers to obtain services (for resale) from the ILEC at discounted prices; and (5) meet other more burdensome requirements to help coordinate entry by new providers.<sup>6</sup> Thus, §251(c) is the source of any requirement that Kentucky ALLTEL has to provide ULS and transport. However, §251(d) of the Act sets forth conditions with respect to a competitive LEC (“CLEC”) that must be present before any LEC may be required to provide access to an element.<sup>7</sup>

In its November 3 Order, the Commission acknowledged that a finding of impairment is mandated by §251(d)(2) before an ILEC may be required to provide UNEs.<sup>8</sup> As §251(d) has been the source of the much litigated “necessary and impair” standard, a determination in this proceeding with respect to whether SETel requires access to Kentucky ALLTEL’s unbundled local switching (ULS) and transport necessarily requires examination and application of the following: (1) the impairment standards established in §251(d)(2) of the Act; (2) the interpretations and directives of the United States Supreme Court (“U.S. Supreme Court”) and the Court of Appeals for the District of Columbia (“D.C. Circuit Court”); and (3) the rules provided in the FCC’s Triennial Review Order (“TRO”).

The Act establishes impairment as the touchstone of the unbundling requirements. In particular, in determining what network elements should be made available, §251(d)(2)(b) of the Act requires that the FCC “consider, at a minimum whether...the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking

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<sup>5</sup> See, 47 U.S.C. §§251 and 252.

<sup>6</sup> 47 U.S.C. §251(c).

access to provide the services that it seeks to offer.”<sup>9</sup> In implementing this section of the Act, the FCC issued its First Report and Order in the matter of *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (“Local Competition Order”).<sup>10</sup> However, the U.S. Supreme Court reversed the FCC’s original Local Competition Order and observed that if “Congress had wanted to give blanket access to incumbents’ networks,” it would not have included §251(d)(2) in the statute at all and rather “would simply have said...that whatever requested element can be provided must be provided.”<sup>11</sup> The U.S. Supreme Court found that the core of the impairment tests is whether lack of access to a given element diminishes the competitor’s ability to provide the services it seeks to provide.<sup>12</sup>

While the FCC’s first attempt at interpreting “impairment” must be ignored as it was rejected by the U.S. Supreme Court in *Iowa Utilities Board*, it is significant and most relevant to this proceeding that in remanding the issue to the FCC, the U.S. Supreme Court directed the FCC to provide some limiting standard to its definition of impairment and concluded that it is not necessarily true that any cost increase (or margin reduction) impairs the ability of a competitor in any material way.<sup>13</sup> Significantly, the U.S. Supreme Court further found that the FCC had failed to consider the availability of elements outside the ILEC’s network, including self-provisioned elements, in its impairment definition.<sup>14</sup>

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<sup>7</sup> 47 U.S.C. §251(d).

<sup>8</sup> November 3 Order at 2.

<sup>9</sup> 47 U.S.C. §251(d)(2)(b).

<sup>10</sup> See, First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Rel. August 8, 1996).

<sup>11</sup> *AT&T Corporation, et. al. v. Iowa Utilities Board, et. al.*, 525 U.S. 366, at 390 (Jan. 25, 1999) (“*Iowa Utilities Board*”).

<sup>12</sup> *Id.* at 392.

<sup>13</sup> *Id.* at 389-390.

<sup>14</sup> *Id.* at 389.

In response to the U.S. Supreme Court's decision above, the FCC issued its Third Report and Order ("UNE Remand Order").<sup>15</sup> In its UNE Remand Order, the FCC defined "impair" as follows:

...the failure to provide access to a network element would "impair" the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.<sup>16</sup>

Consistent with the U.S. Supreme Court's direction, the FCC did not include "cost" or "profit margin" in its definition of impairment.

When the FCC's UNE Remand Order was subsequently challenged, the D.C. Circuit Court found that the FCC wrongly relied on cost disparities that were simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector.<sup>17</sup> The D.C. Circuit Court remanded the issue to the FCC and warned that adopting a uniform national rule mandating an element's unbundling in every market regardless of the state of competitive impairment would make UNEs available to CLECs in many markets where competition is not suffering from any impairment.<sup>18</sup> The FCC responded to the D.C. Circuit Court's remand by issuing the TRO on August 28, 2003, and although the TRO is being challenged in the D.C. Circuit Court by ILECs and CLECs, it currently has not been stayed. By applying the TRO provisions to this proceeding, Kentucky ALLTEL is not

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<sup>15</sup> Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Rel. November 5, 1999) ("UNE Remand Order").

<sup>16</sup> *Id.* at ¶51.

<sup>17</sup> *United States Telecom. Association, et. al. v. FCC, et. al.*, 351 U.S. App. D.C. 329; 290 F.3d 415, 428 (May 24, 2002).

<sup>18</sup> *Id.* at 422.

waiving and expressly reserves its right to challenge the TRO to the extent it is determined to be inconsistent with the Act and the U.S. Supreme Court and D.C. Circuit Court's directions.

With respect to ULS, the FCC concluded in the TRO that CLECs are not impaired with respect to enterprise customers (i.e., customers served by DS1 or greater services in all geographic markets).<sup>19</sup> While the FCC presumed impairment of local switching with respect to mass market customers, the FCC established two types of "triggers" that must be applied before ULS may be required.<sup>20</sup> First, a market is not impaired if three or more carriers, unaffiliated with either the ILEC or each other, are serving mass market customers in a particular market using self-provisioned switches.<sup>21</sup> Second, a market is not impaired if two or more competitive ULS wholesale suppliers, unaffiliated with the ILEC or each other, are present.<sup>22</sup> If either trigger is met, the state commission must find that the market is not impaired. Even if the triggers are not met, the TRO further established a series of operational and economic parameters for testing the ability of a new entrant to provide service by accessing an ILEC's UNEs.<sup>23</sup> Pursuant to the TRO, state commissions must determine impairment on a market-by-market basis with respect to mass market customers.

While the FCC provided that its impairment presumption would be addressed in the 90-day and 9-month TRO proceedings and anticipated (and several parties also advocated) that state commission decisions in these proceedings would be incorporated into the arbitration agreement process, it obviously was referring to arbitrations that follow the TRO proceedings. Significant for this pre-TRO arbitration; however, is recognition and acknowledgement that failure to incorporate the unbundling analysis into the arbitration

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<sup>19</sup> TRO at ¶451.

<sup>20</sup> *Id.* at ¶ 461.

<sup>21</sup> *Id.* at ¶462.

<sup>22</sup> *Id.* at ¶463.

<sup>23</sup> *Id.*



process could be legally suspect as the Act provides that state commissions will resolve unbundling issues in conducting arbitrations between carriers and approving interconnection agreements pursuant to the Act and the regulations promulgated by the FCC.<sup>24</sup> Therefore, to be compliant with the Act and the TRO, the trigger analysis must also be conducted in this proceeding before Kentucky ALLTEL's obligations with respect to such unbundled elements may be determined or such must be denied.

### B. SETEL IS NOT A FLEDGLING NEW ENTRANT

Prior to applying the impairment standards to SETel, it is essential to understand who SETel is and how it operates. To be clear, SETel is not a fledgling new entrant. SETel has a well-developed implemented business plan predicated on providing local, long distance, and data services. In offering retail services, SETel concurs in the retail tariffs of Verizon South, Inc., which are reflective of Kentucky ALLTEL's retail offerings.<sup>25</sup>

SETel is a successful multi-product communications firm offering long distance, data, and local service utilizing a switch in Lexington as well as its own fiber optic transport network. SETel is not a new entrant requiring the "jump-start" of UNE-P.<sup>26</sup> SETel is a CLEC, a competitive access provider ("CAP"), and an interexchange carrier ("IXC")<sup>27</sup> and currently has over 5,000 subscribers.<sup>28</sup> Additionally, SETel offers dial-up Internet and broadband digital subscriber line ("DSL") data services in the Commonwealth of Kentucky.<sup>29</sup>

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<sup>24</sup> TRO at ¶427.

<sup>25</sup> Jeffrey Reynolds Direct Testimony at pages 10-11, lines 20-26 and 2-12.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at page 15, lines 10-11. *See also*, Timothy Wagner Direct Testimony at page 3, lines 2-3.

<sup>28</sup> Jeffrey Reynolds Direct Testimony at page 10, line 15.

<sup>29</sup> Timothy Wagner Direct Testimony at page 3, lines 3-4.

SETel provides retail services in a bundle and advertises a single bill for the bundle. It utilizes agents to market and sell SETel services – an efficient way to control its expenses. As will be discussed in more detail later, SETel’s Lexington switch is capable of performing local switching.<sup>30</sup> Further, in recent access service requests (“ASRs”) provided by SETel to Kentucky ALLTEL, SETel specified an eighty percent local usage (“PLU”) factor and in so doing represented to Kentucky ALLTEL that eighty percent (80%) of the traffic that SETel will send to Kentucky ALLTEL in Lexington will be local traffic.<sup>31</sup> In other words, SETel will be switching local voice traffic in Lexington.<sup>32</sup>

As attested to by SETel on its own website, SETel is currently providing local service and prepaid service to mass market and enterprise market customers in several locations in the Commonwealth.<sup>33</sup> SETel offers its mass market local customers vertical features such as call waiting, call return, caller identification, third party calling, and area calling. Additionally, SETel offers various calling packages for businesses and residential service (both mass market and enterprise market customers) including long distance, dial-up Internet, and DSL access.<sup>34</sup>

Moreover, SETel has been designated as an eligible telecommunications carrier (“ETC”) for federal universal service purposes in the territories of BellSouth and Kentucky ALLTEL. Obtaining ETC status for the purposes of receiving universal service funding is not the action of an unsophisticated communications provider.<sup>35</sup>

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<sup>30</sup> Timothy Wagner Direct Testimony at pages 10-11, lines 20-26 and 2-12.

<sup>31</sup> *Id.* at Attachment 5. *See also*, Transcript at page 79.

<sup>32</sup> Jeffrey Reynolds Direct Testimony at page 11, lines 11-12.

<sup>33</sup> *See*, [www.setel.com](http://www.setel.com).

<sup>34</sup> Timothy Wagner Direct Testimony at page 3, lines 8-13. Transcript at pages 72-74. *See also*, Kentucky ALLTEL’s Hearing Exhibit No. 1.

<sup>35</sup> Jeffrey Reynolds Direct Testimony at pages 10-11, lines 25-26 and 2-5; page 15, lines 11-12.

Additionally, SETel's Report of Gross Operating Revenue Derived from Intra-Kentucky Business for the Year Ending December 31, 2002 (on file with this Commission and made a matter of public record) reflects SETel assessable revenues in excess of \$2,270,000. With over 5,000 customers and \$2 million in revenues, SETel is not a fledgling startup but rather, a very viable established telecommunications company.

**C. SETEL IS NOT IMPAIRED BECAUSE IT HAS SELF PROVISIONED A  
LOCAL SERVICE CAPABLE SWITCH**

It has been established that SETel is not a fledgling new entrant, and it is also important to consider the capabilities of SETel's switch. Pursuant to the prefiled direct and live rebuttal testimony of Timothy Wagner on behalf of Kentucky ALLTEL, the live direct testimony and cross-examination of Wesley Maynard on behalf of SETel, and other data provided in this proceeding, SETel has the current ability to provide its own local switching and transport.<sup>36</sup> Additionally, there are numerous economical alternative switching and transport arrangements that are available to SETel. These include alternatives for SETel's current switching and transport capabilities within Kentucky ALLTEL's greater Lexington exchange area, alternatives for additional or new switching facilities, and alternatives for transport to other switching centers.<sup>37</sup> Clearly, SETel is not economically impaired from providing and utilizing its own local switching. Furthermore, it was unrefuted that SETel faces no operational barriers without access to Kentucky ALLTEL ULS.<sup>38</sup> Therefore,

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<sup>36</sup> Timothy Wagner Direct Testimony at page 4, lines 23-24; page 5, lines 4-11; page 6, lines 11-13; page 7, lines 15-19; page 12, lines 8-16; page 13, lines 7-27. Transcript at pages 57, 65-68, 71, 74, 77, 204-213, and 216-218.

<sup>37</sup> Jeffrey Reynolds Direct Testimony at page 8, lines 13-18; page 9, lines 2-9; page 13, lines 9-25; page 14, lines 2-7. Timothy Wagner Direct Testimony at pages 12-13, lines 20-28 and 1-4. Transcript at pages 157, 170-173, and 200-201.

<sup>38</sup> Jimmy Dolan Direct Testimony at pages 3-9. Transcript at pages 197, and 200-201.

consistent with the Act, the U.S. Supreme Court's interpretation, and the D.C. Circuit Court's decision, SETel is not impaired and must be denied access to Kentucky ALLTEL's ULS. SETel is not impaired under the Act, overcomes the self-provisioning aspect of the UNE Remand Order, and also meets the self-provisioning criteria of the TRO.

In particular, SETel has indicated by its testimony in this proceeding, its entries in the Local Exchange Routing Guide ("LERG"), and its ASRs submitted to Kentucky ALLTEL when SETel ordered trunks that its switch is presently capable of switching voice service and is in fact doing so.<sup>39</sup> As mentioned above, Wesley Maynard on behalf of Staff and SETel as well as Timothy Wagner and Jeffrey Reynolds on behalf of Kentucky ALLTEL all established that SETel's switch is capable of switching voice grade traffic.<sup>40</sup> For example, Mr. Maynard admitted on live direct examination by Staff that SETel's switch is operating today as a tandem IXC switch and "does some two-way local interconnection, local traffic, between BellSouth and [SETel] and also has some one-way local connectivity for tandeming."<sup>41</sup> Further, on cross examination, Mr. Maynard stated that SETel's switch can handle the translations with respect to voice communications that are housed in SETel's switch and are identified in the LERG; in other words, if an end user calls a SETel number, SETel's switch identifies the call and hands the call off to the called party. Mr. Maynard explained that this scenario is currently in place today between SETel and BellSouth.<sup>42</sup> In Mr. Maynard's own words, "It'll handle local traffic."<sup>43</sup>

Kentucky ALLTEL's witnesses testified consistent with Mr. Maynard's assertions with respect to the present capability of SETel's switch to support voice service. For instance,

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<sup>39</sup> See, Timothy Wagner Direct Testimony at Attachments 1-5.

<sup>40</sup> *Id.* at page 4, lines 23-24; page 5, lines 4-11; page 6, lines 11-13; page 7, lines 15-19; page 12, lines 8-16; page 13, lines 7-27. Transcript at pages 57, 65-68, 71, 74, 77, 170, 204-213, and 216-218.

<sup>41</sup> Transcript at page 57.

<sup>42</sup> *Id.* at pages 65-66.

after observing the relevant call detail records and Kentucky ALLTEL's test calls, Mr. Reynolds noted that the calls were made and directed through SETel's switch and that the calls were actual dial tone calls.<sup>44</sup> Similarly, Mr. Wagner, after describing the test calls he performed, the call detail records he examined, and the additional research he conducted, concluded that SETel's switch is capable today of delivering dial tone and supporting any voice grade services that SETel may wish to offer in a competitive environment in greater Lexington. Mr. Wagner based his conclusion in part on call records that demonstrate that SETel's Lexington switch is supporting a telephone number in Pikeville and transporting that call approximately 185 miles and terminating it to SETel's business office.<sup>45</sup>

SETel has also indicated its present switch capabilities in the LERG, which is an online database operated by Telcordia (formerly Bellcore). The primary purposes of the LERG are to provide a resource through which all telecommunications carriers can identify their switches and provide notice to all other carriers of all routing details necessary for carriers to participate in the United States telecommunications industry.<sup>46</sup> Unless a carrier accurately and regularly participates in posting its switch and routing information to the LERG, it will not be able to participate in telecommunications in the United States. Switch homing information, NPA-NXX routing, as well as network element and equipment designation are all recorded by switch ID or by NPA/NXX. The integrity of the data entered on the LERG is dependant on each individual carrier, and all carriers are dependant on full and accurate participation in order to make their telecommunications system work.<sup>47</sup>

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<sup>43</sup> Transcript at page 66.

<sup>44</sup> *Id.* at pages 166, 169-170.

<sup>45</sup> *Id.* at pages 205-206.

<sup>46</sup> Timothy Wagner Direct Testimony at page 4, lines 4-9.

<sup>47</sup> *Id.* at page 4, lines 9-17.

Section 7 of the LERG identifies SETel's switch as ID LXTNKY24W26 and its location as 301 East Main Street, Suite 620, Lexington, Kentucky 40507 (i.e., only 0.2 miles from Kentucky ALLTEL's Lexington Main Central Office). The Kentucky ALLTEL and SETel switching platforms are currently interconnected for voice traffic.<sup>48</sup> SETel identified its switch as a local exchange telecommunications switch and has indicated in Section 7 of the LERG that its switch is an end office, which is an office capable of line-to-line, line-to-trunk, and trunk-to-trunk connections.<sup>49</sup> Moreover, SETel's switch has a homing arrangement to three tandems in the Winchester LATA (Lexington's serving LATA), and SETel has identified in the LERG Feature Group B & D traffic routes to the Winchester 02T tandem, Feature Group B & D traffic routes to the Lexington 01T tandem, and Feature Group D traffic routes to the Danville 01T tandem. This arrangement provides for originating and terminating traffic to be transported on these facilities to each of these tandem sites.<sup>50</sup> All of the information posted by SETel on the LERG demonstrates that SETel's switch is currently capable of switching local exchange voice services in competition with those services traditionally provided by ILECs.<sup>51</sup>

Section 6 of the LERG further identifies SETel's thirty-three NPA/NXX blocks, each totaling 10,000 numbers and residing on SETel's switching platform.<sup>52</sup> As noted by Mr. Wagner and Mr. Maynard, these numbers can be dialed from these rate centers and from any other telephone nationwide.<sup>53</sup> Additionally, Mr. Wagner called some of the SETel numbers to determine that they route to SETel's switch, and although he wondered whether most of the numbers were used for dial up internet access, Mr. Maynard testified that the numbers are

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<sup>48</sup> Timothy Wagner Direct Testimony at page 4, lines 21-24 and Attachment 1.

<sup>49</sup> *Id.* at page 5, lines 1-4 and at Attachment 2.

<sup>50</sup> *Id.* at page 6, lines 6-13 and at Attachments 4.1, 4.2, and 4.3.

<sup>51</sup> *Id.* at page 13, lines 9-15.

<sup>52</sup> *Id.* at page 6, lines 1-4 and at Attachment 3.

directed to SETel's switch but that SETel's switch is not used in SETel's internet access business.<sup>54</sup> Therefore, although Mr. Wagner believed that the call detail records included four voice calls through the SETel switch and thereby proved that SETel's switch is voice capable, Mr. Maynard's statements that the SETel switch is not used for internet service demonstrate that Mr. Wagner's four identified voice calls were actually 9,000 voice calls through the SETel switch. The call detail records provided under confidential seal by Kentucky ALLTEL in response to the Commission's supplemental data request, reflect over 9,000 calls to the SETel numbers in the SETel switch from November 1 to November 10, 2003.<sup>55</sup>

Notwithstanding Mr. Maynard's statements with respect to SETel's switch not being used in SETel's internet service, Mr. Wagner correctly concluded the following based on his own research, tests, and direct observations:

Because I can terminate to these number blocks and because SETel's Feature Group B & D facilities are configured for two-way traffic, then I can certainly originate traffic from these 33 NPA/NXXs. By definition, the fact that SETel can terminate traffic alone is a qualifying service. SETel's network is configured to originate traffic on the same facilities within the LATA and outside the LATA. SETel owns this switch, and currently operates it providing qualifying service.<sup>56</sup>

In particular, SETel's switch is an Excel LNX 2000 switching platform and is a carrier-class open architecture switching platform, capable of supporting many services. SETel's switching platform is manufactured and supported by Excel Switching Corporation and can support, among other services, Internet dial-up, tandem, toll, and local voice services. The open architecture allows for the multi-service platform.<sup>57</sup>

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<sup>53</sup> *Id.* at page 6, lines 1-3. Transcript at page 53.

<sup>54</sup> *Id.* at page 7, lines 4-19. Transcript at page 80.

<sup>55</sup> *See*, Kentucky ALLTEL Supplemental Data Request Exhibit 4.

<sup>56</sup> Timothy Wagner Direct Testimony at page 7, lines 15-19.

<sup>57</sup> Timothy Wagner Direct Testimony at page 7, lines 23-26. *See also*, Kentucky ALLTEL Supplemental Data Request Exhibit 5(a).

The manufacturer's technical specifications with respect to SETel's switch corroborate Mr. Wagner's statements with respect to the voice grade capability and further enhancement of the SETel switch. For example, Excel states that its converged services platform is a high-performance, carrier-grade open services system that addresses an industry demand for profitable applications. Its multi-function design enables developers to create and deliver new revenue-generating services for both legacy and next-generation networks, quickly, and cost effectively and it supports converged wireline, wireless and IP networks. In Excel's own words, the converged services platform can expedite time to market, reduce costs, increase revenues and protect the carrier's investment.<sup>58</sup>

Additionally, and most telling, Excel identified Network Telco, Inc. ("Network Telco") as one of its open network platform partners and a provider of complete carrier-class Central Office switching solutions.<sup>59</sup> Network Telco communicated to Kentucky ALLTEL in a confidential communication filed under seal in Kentucky ALLTEL's Supplemental Data Request Exhibit 5(c) that its turn-key solution and switch solutions on the Excel switch are being used by customers around the world "for providing local CLEC services, PRI Offload, Internet Call Diversion, Softswitch, Pre-Paid, Toll Tandem, Wireless Network Tandem, LNP, Voice Mail, and International Gateway." Further, Network Telco stated that its software is "extremely robust and powerful and can be applied in conjunction with the Excel switching platform to perform a variety of services either individually or combined on one stand-alone platform. Network Telco lists the basic and class calling features including, but not limited to, call forwarding, busy line-redial, call waiting, call return, customer originated call trace, caller ID, priority ringing, selective call forwarding, enhanced 911, toll restriction, and local number

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<sup>58</sup> Kentucky ALLTEL Supplemental Data Request at Exhibit 5(a).

<sup>59</sup> *Id.* at Exhibit 5(b).



portability as well as advanced Class 5 Call Management Services and Basic Business Centrex.<sup>60</sup> Network Telco estimated that a total turnkey with installation and support upgrade to the Excel switch would be a maximum of \$268,454.<sup>61</sup> Thus, even if upgrades to SETel's switch are needed, they can be accomplished and very economically.

The manufacturer's specifications verify that SETel's switching platform is therefore capable of supporting CLEC local services in Kentucky.<sup>62</sup> The SETel platform is currently configured as Time Division Multiplex ("TDM") interface system and fully capable of interfacing a subscriber T-1 channel bank or other similar subscriber device. The converged services platform ("CSP"), in addition to TDM capable services, will support and enable IP services and IP call control. The LNX2000 switching platform is NEBS3 and (5) 9s compliant and is classified as a carrier-grade switching platform. The 20-slot chassis (16 service slots) interfaces the PSTN and access network via T-1 interfaces and utilizing the 2/4/8/16 port T-1 cards. This platform is capable of SS7 signaling and supports both ISUP and TCAP messaging.<sup>63</sup>

The open architecture of SETel's switch is supported by multiple next-generation application providers, like Intellinet, who has partnered with Excel to offer many services on the LNX 2000 platform dating all the way back to 1998. These application providers can provide feature packages for the Excel LNX 200 platform or custom create features. This means that even if SETel's switch were not currently capable of providing services that a CLEC would normally need for serving end-users, it can be upgraded to do so.<sup>64</sup> The open architecture of the LNX 2000 is similar to buying a computer without any operating system

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<sup>60</sup> Kentucky ALLTEL Supplemental Data Request at Exhibit 5(c).

<sup>61</sup> *Id.* at Exhibit 5(d).

<sup>62</sup> Timothy Wagner Direct Testimony at page 7, lines 24-25 and page 9, lines 4-7. Kentucky ALLTEL Supplemental Data Request Exhibits 5(a) - 5(r).

<sup>63</sup> Timothy Wagner Direct Testimony at page 8, lines 7-16.

software or programs. The application developer would utilize an application development software solution that would load onto the processor and memory of the CPU of the LNX 2000. Utilizing this software, the developer could develop local service features and additional custom features. This platform is fully upgradeable to the current generation platform supported and sold by Excel Switching Corporation, which is referred to as the CSP. The telecommunications equipment market is currently saturated with surplus LNX 2000 interface cards making this hardware addition extremely affordable.<sup>65</sup>

In addition to its own switching solution there are several alternative switching solutions that could easily be integrated into the SETel network.<sup>66</sup> In fact, SETel has indicated it is exploring those options. On a conference call between Kentucky ALLTEL and SETel on February 10, 2003 (ALLTEL Representatives: Ray Bodnar and Mary Nitzsche; SETel Representative: Wes Maynard), SETel indicated that it would like to replace this switching platform.<sup>67</sup>

Even if SETel had not self-provisioned its local service capable switch, there are multiple next generation switching platforms currently on the market that offer an attractive entry cost into the CLEC market. Attachment 6 to Timothy Wagner's Direct Testimony illustrates that, by utilizing the Taqua Communications OCX platform (Next-Generation RUS certified platform), SETel could provide one collocation in Lexington Main and place the OCX in its Lexington central office for a one-time cost of \$449,195. The monthly recurring cost for this solution is only \$1,659 (not including the UNE loop or EELs). This Taqua Platform would support 5,000 customers and easily could be upgraded to support additional subscribers at minimal cost. In addition to this switching platform, there are multiple other

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<sup>64</sup> Timothy Wagner Direct Testimony at page 9, lines 4-7.

<sup>65</sup> *Id.* at page 9, lines 12-28 and page 10, lines 1-2.

vendors marketing both new and reuse switching platforms. Due to the current saturation of used switching platforms and used vendors many reused platforms are available at reduced costs (greater than 50%) in the market place.<sup>68</sup>

#### D. SETEL IS NOT IMPAIRED BECAUSE THE TRO TRIGGERS ARE SATISFIED

While the above evidence is sufficient under the Act and the interpretations of the Act by the U.S. Supreme Court and D.C. Circuit Court and requires denial to SETel of access to Kentucky ALLTEL's ULS, SETel must also be denied access to Kentucky ALLTEL ULS as the TRO triggers are satisfied.

As to enterprise market customers, the TRO establishes a presumption of no operational or economical impairment on a national basis,<sup>69</sup> and as that presumption is applicable here, SETel is unimpaired. No evidence was presented by either SETel or Staff that rebutted this presumption. Therefore, as to enterprise markets, Kentucky ALLTEL is not, according to the TRO, required to provide ULS.

With respect to mass market customers, in order to determine whether the TRO triggers are met, it is necessary to identify the market that is being examined. The unrefuted and even unchallenged evidence in this proceeding established that a single switch can be utilized to switch customers throughout the entire state, which is already being done in Kentucky by AT&T Broadband Phone of Kentucky, LLC ("AT&T Broadband").<sup>70</sup> Even if a state-wide market definition is not adopted, as to SETel, it is unrefuted that SETel's Lexington

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<sup>66</sup> Timothy Wagner Direct Testimony at page 10, lines 20-21.

<sup>67</sup> *Id.* at page 10, lines 26-28.

<sup>68</sup> *Id.* at page 11, lines 7-21.

<sup>69</sup> TRO at ¶¶451, 454.

<sup>70</sup> Jeffrey Reynolds Direct Testimony at page 13, lines 17-25. Transcript at page 164.

switch is switching voice traffic as far away as Pikeville (almost 200 miles).<sup>71</sup> Therefore, the minimum market for application of the TRO triggers and determining whether SETel is impaired without ULS from Kentucky ALLTEL should be 200 miles in any direction from Lexington/Louisville and 200 miles from each wholesale provider of switching (e.g., Brandenburg Telecom, LLC ("Brandenburg"), South Central Telecom, LLC ("South Central"), and AT&T Broadband).

Alternatively, at a minimum, the greater Lexington/Louisville mass market and a 200-mile radius around Lexington/Louisville is not impaired relative to local switching. As described earlier, the TRO trigger is satisfied if at least three self-provisioned switches are present.<sup>72</sup> Lexington has at least three competitive providers serving the mass market with self-provisioned switches. These carriers include AT&T Broadband, Telcove f/k/a Adelphia, and NuVox. Louisville has other CLECs that have self provisioned switches, and AT&T Broadband is switching its Lexington customers out of its Louisville switch.<sup>73</sup> Further, there are numerous CLECs in Cincinnati, Ohio with their own capable switches.<sup>74</sup>

The TRO also established a wholesale trigger of two wholesale providers in the market.<sup>75</sup> A number of switches in or near the Kentucky ALLTEL service area are operated by competitive providers and are available to SETel. In particular, competitors in the market with self-provisioned switches providing service to other entities include Brandenburg, South Central, and AT&T Broadband. These carriers provide wholesale switching to either affiliated CLECs or through arrangements with local cable companies. Additionally, there are at least ten competitors with switches in Cincinnati, Ohio, which is only approximately seventy miles

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<sup>71</sup> Transcript at pages 205-206.

<sup>72</sup> TRO at ¶462.

<sup>73</sup> Jeffrey Reynolds Direct Testimony at page 8, lines 13-18.

<sup>74</sup> *Id.* at page 9, lines 6-7. Transcript at pages 157-158.

<sup>75</sup> TRO at ¶¶504-505.

from Lexington, and those competitors may be providing wholesale switching.<sup>76</sup> In short, as SETel has a myriad of options for obtaining access to ULS including at least two wholesale providers, the TRO wholesale trigger is, therefore, satisfied.

Although it is not necessary under the TRO to proceed further as the local switching triggers are clearly satisfied, a further basis for finding non-impairment is provided under the TRO. Even if the triggers were not satisfied, SETel would be found non-impaired because as discussed earlier, it has self provisioned or can economically upgrade or self provision a switch and faces no operational barriers to competition.<sup>77</sup> SETel is simply not prevented from entering and successfully competing in the Kentucky ALLTEL market without being provided Kentucky ALLTEL ULS or transport.

From an operational perspective, no evidence was presented that any barriers exist to SETel utilizing its own switch. The only evidence was that presented by Kentucky ALLTEL demonstrating that Kentucky ALLTEL has the ability to meet SETel's needs for collocation, cross-connects and "hot-cuts," and that no operational barriers exist to SETel utilizing Kentucky ALLTEL's unbundled loops, cross connects, collocation and number porting and hot cut processes.<sup>78</sup> Indeed, since August of 2002, Kentucky ALLTEL has ported over 10,000 telephone numbers (representing over 6,648 mass market customers and 289 enterprise market customers) and has installed approximately 200 UNE loops with cross connects without any significant issue or delays.<sup>79</sup> No formal complaints have been filed with the Commission with respect to Kentucky ALLTEL's provisioning, and, in fact, there could have been no such complaints because CLECs have not had any such operational problems that

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<sup>76</sup> Jeffrey Reynolds Direct Testimony at page 9, lines 2-9.

<sup>77</sup> See, Jeffrey Reynolds Direct Testimony at page 9, lines 14-20.

<sup>78</sup> Jimmy Dolan Direct Testimony at page 10, lines 24-27.

<sup>79</sup> *Id.* at page 4, lines 5-7 and page 9, lines 2 and 3.

have been barriers to providing service.<sup>80</sup> Kentucky ALLTEL has not rejected any hot cut requests<sup>81</sup> and has not experienced any problems in meeting CLECs' requested times for hot cuts.<sup>82</sup> Kentucky ALLTEL has not encountered space problems in any of its end offices in Kentucky and presently has a total of six CLECs with eighteen total collocation spaces in Kentucky, three of which are virtual collocation. Kentucky ALLTEL does not have any space availability issues in any of its offices at this time.<sup>83</sup> Further, Kentucky ALLTEL witness Jimmy Dolan, who has been both directly and indirectly involved in the interconnection negotiations with SETel for eighteen months and reviewed the entire file regarding the negotiations, stated that SETel has not expressed any concern with respect to Kentucky ALLTEL's operations or any related matter.<sup>84</sup> SETel, with a customer base of slightly over 5,000 subscribers, would not likely need any massive hot cut capability that would tax Kentucky ALLTEL's capabilities. Significantly, as SETel has expressed a desire for collocation with Kentucky ALLTEL, SETel itself does not consider provision of ULS or UNE-P necessary.<sup>85</sup>

SETel's obvious goal is to drive a UNE-P price to a point that is lower than its own internal cost of providing transport and switching. This strategy has the two-fold effect of conserving the capacity on SETel's switch for utilization in other markets for other services and also of requiring Kentucky ALLTEL to utilize its switching resources at below-cost levels, thereby depleting Kentucky ALLTEL's financial resources.<sup>86</sup> This is the very

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<sup>80</sup> Jimmy Dolan Direct Testimony at page 4, lines 12-15.

<sup>81</sup> *Id.* at page 5, lines 2-3.

<sup>82</sup> *Id.* at page 6, lines 2-3.

<sup>83</sup> *Id.* at page 7, lines 2-5.

<sup>84</sup> *Id.* at page 7, lines 17-24.

<sup>85</sup> Jeffrey Reynolds Direct Testimony at page 10, lines 14-18.

<sup>86</sup> *Id.* at page 12, lines 5-20.

condition that the U.S. Supreme Court attempted to remedy when it mandated that a competitor's profitability was not guaranteed through the acquisition of unbundled elements.

In *Iowa Utilities Board*, the U.S. Supreme Court declared:

... the Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and caused the failure to provide that element to "impair" the entrant's ability to furnish its desired service is simply not in accord with the ordinary and fair meaning of those terms. An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not *ipso facto* been "impair[ed]" ... in its ability to provide the services it seeks to offer"; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is "necessary."<sup>87</sup>

Additional items arose in the course of negotiations that clarified SETel's reason for seeking ULS or UNE-P from Kentucky ALLTEL. For instance, SETel has requested that reciprocal compensation be paid on ISP-bound traffic terminating on its network.<sup>88</sup> SETel has also pushed for a flat-rated port charge.<sup>89</sup> Taken together, these two items indicate that SETel desires to move significant amounts of ISP-bound traffic through Kentucky ALLTEL's switches. This action on the part of SETel would not only burden Kentucky ALLTEL's switches but would also provide SETel with a revenue windfall in the form of reciprocal compensation if SETel were allowed to be paid for ISP-bound traffic.<sup>90</sup> SETel's interest in providing Internet service was emphasized by SETel President, Darrell Maynard, in his presentation to the Rural Utilities Service in which he spoke of the need for deployment of broadband services to rural America.<sup>91</sup> The only logical conclusion to be drawn from these facts is that SETel is merely seeking access to Kentucky ALLTEL's ULS or UNE-P simply to

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<sup>87</sup> *Iowa Utilities Board* at 389-390.

<sup>88</sup> See, SETel's Petition filed herein on August 7, 2003.

<sup>89</sup> *Id.*

<sup>90</sup> Jeffrey Reynolds Direct Testimony at page 12, lines 8-13.

enhance its bottom line. SETel is clearly not impaired in any way under any of the impairment tests from providing retail services to its customers.<sup>92</sup>

E. SETEL IS NOT IMPAIRED WITH RESPECT TO UNBUNDLED TRANSPORT.

SETel currently has transport facilities into the Lexington Main central office and previously ordered and received an OC-12 facility from its switch located at 301 Main to the Lexington Main central office located downtown on Martin Luther King Boulevard. This facility provides SETel access to multiple IXC's, Kentucky ALLTEL's tandem switch, LXTNKYMA01T, and to the many Intra-Metropolitan Transport providers. Currently, SETel utilizes this facility to interface the Kentucky ALLTEL tandem with 264 trunks and the additional two tandems in the Winchester LATA.<sup>93</sup>

Additionally, other transport providers offer transport services in the metro-Lexington area. There are several CAPs in the Lexington market today including the following:

- KDL networks, NewSouth, AT&T, and Xspedius offer local access into Kentucky ALLTEL's Lexington Main central office through each of their vast statewide and even nationwide networks.
- Telcove (f/k/a Adelphia) interfaces Kentucky ALLTEL's switching network in Lexington Main, Southeast, and Lakeside.

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<sup>91</sup> *Id.* at page 12, lines 13-16. *See also*, Statement of Darrell Maynard, *Rural Utilities Service Public Meeting on Rural Broadband Access*, [http://www.usda.gov/rus/telecom/publicmeeting/pdf\\_files/southeast\\_tel\\_estimony.pdf](http://www.usda.gov/rus/telecom/publicmeeting/pdf_files/southeast_tel_estimony.pdf) (June 27, 2002).

<sup>92</sup> *Id.* at page 12, lines 18-20 and page 13, lines 1-3.

<sup>93</sup> Timothy Wagner Direct Testimony at page 12, lines 10-16 and at Attachment 8.



- Novox/Gabriel interfaces Kentucky ALLTEL's switching network in Lexington Main, North, and South.<sup>94</sup>

Collectively, these transport providers provide alternative transport to four of the Lexington central offices. EELs could also provide a cost competitive interface into the other two central offices if necessary. This solution would eliminate the need for SETel to collocate in those two remaining offices.<sup>95</sup>

On redirect examination, Kentucky ALLTEL witness, Timothy Wagner, stated:

[SETel has] a significant network from our exchanges that rides, when they dial these local NPA/NXXs associated with their dial-up Internet product that rides our common group to these tandems and then is transported via these trunk groups that we've discussed, Feature Group B and D, to their switch to terminate this traffic on a modem bank that sits behind that switching platform. This is an indication in this area as well as the fact that we know that they're supporting their Internet product with a company called ALEC, Touchtone Communications, in the balance of Kentucky and have ported numbers in association with that switching platform that is also directed and terminated on that modem bank. [SETel has] a relationship with some underlying carrier. We know that ALEC, Touchtone Communications utilizes KDL, which was mentioned in [Jimmy Dolan's] testimony, as an underlying carrier to transport some of this traffic.<sup>96</sup>

Mr. Wagner demonstrated that SETel owns and operates a switching platform (LXTNKY24W26) less than a quarter of a mile from the Kentucky ALLTEL's Lexington main central office, which switching platform is capable of and is currently performing CLEC services. Further, as previously noted, Mr. Wagner and the manufacturer's specifications established that SETel's switching platform is an open architecture switching platform capable of hosting and supporting collocation services within the Lexington exchange. Because the SETel switching platform is currently interconnected with the Lexington switching

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<sup>94</sup> *Id.* at page 12, lines 20-28 and at Attachment 8.

<sup>95</sup> Timothy Wagner Direct Testimony at page 13, lines 1-4 and at Attachment 8.

<sup>96</sup> Transcript at pages 207-208.

infrastructure and two additional tandems (Winchester, and Danville) in the Winchester LATA.<sup>97</sup> Utilizing this interconnection and underlying transport facility, SETel can provision transport on multiple alternative transport providers and, utilizing existing UNE and EELs capabilities, gain access through Kentucky ALLTEL's Access Tariff to customers in the Lexington exchange.<sup>98</sup>

SETel is not impaired by its existing switching platform nor by the alternative transport options from offering competitive services to residential or commercial customers in Kentucky ALLTEL markets today. The costs to provide virtual collocations (both one-time and monthly recurring costs) and any necessary switching platform upgrades are economically feasible. Additionally, if SETel chooses to replace its existing switching platform, vendors exist in the market to provide a low-cost switching alternative for both new and /or used to provide both local and tandem functionality.<sup>99</sup>

In conclusion, as the relevant facts noted throughout Section II above have been unrefuted by SETel and in many instances even verified by SETel, the evidence in this proceeding demonstrates that SETel is not impaired as to local switching and transport.

**III. EVEN IF SETEL WERE IMPAIRED, THE COMMISSION MUST SUSPEND ANY UNBUNDLED SWITCHING AND TRANSPORT OBLIGATIONS AND ANY FURTHER REDUCTION IN UNE RATES PURSUANT TO §251(f)(2) OF THE ACT.**

The interconnection requirements set forth in §251(c) of the Act include the most onerous unbundling requirements and apply only to ILECs.<sup>100</sup> Congress recognized from the beginning that the requirements appropriate to balance the market areas of the largest ILECs,

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<sup>97</sup> Timothy Wagner Direct Testimony at page 13, lines 9-15.

<sup>98</sup> *Id.* at page 13, lines 17-19.

<sup>99</sup> *Id.* at page 13, lines 21-27.

i.e. the Regional Bell Operating Companies (“RBOCs”), are generally inappropriate to apply to areas served by smaller LECs and may not be appropriate to apply to two percent rural carriers. There is little doubt that the requirements of §251(c) go beyond what is expected of companies in other competitive industries. Requiring an ILEC to operate under these disadvantageous requirements automatically imposes a burden that would not be imposed otherwise. Congress realized that such a negative impact could severely jeopardize universal service and be economically burdensome to fewer than two percent carriers and their customers, and therefore attempted to prevent such a result through the rural exemption and the two percent suspension and modification provisions of §251 (f)(2) of the Act.<sup>101</sup>

The Act recognizes the need for state commissions to protect the public interest by suspending and/or modifying, with respect to fewer than two percent LECs, the interconnection obligations set forth in both §§251(b) and (c). Specifically, §251(f)(2) of the Act provides that a state commission shall grant a petition to suspend these interconnection obligations when the suspension is necessary to avoid (1) significant adverse impact on telecommunications users; (2) imposing a requirement that is economically burdensome; or (3) imposing a requirement that is technically infeasible. These standards reflect a public policy that has consistently been followed by both federal and state regulators to protect the public interest of rural telecommunications users and preserve universal service in rural service territories.<sup>102</sup>

In its entirety, §251(f)(2) of the Act provides as follows:

A local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application

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<sup>100</sup> 47 U.S.C. §251(c).

<sup>101</sup> Steve Mowery Direct Testimony at page 5, lines 8-20. *See also*, 47 U.S.C. §251(f).

<sup>102</sup> Steve Mowery Direct Testimony at page 6, lines 1-8. *See also*, 47 U.S.C. §251(f).

of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

- A. is necessary
  - (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
  - (ii) to avoid imposing a requirement that is unduly economically burdensome; or
  - (iii) to avoid imposing a requirement that is technically infeasible; and
- B. is consistent with the public interest, convenience, and necessity.<sup>103</sup>

Kentucky ALLTEL is a fewer than two percent rural carrier within the meaning of §251(f)(2) of the Act in that Kentucky ALLTEL and all of its affiliate LECs in the aggregate nationwide serve approximately 2.9 million of the nation's total 187.5 million subscriber lines, or approximately 1.54%. Therefore, Kentucky ALLTEL is qualified to petition this Commission for a suspension or modification of §§251(b) or (c) of the Act, and the Commission is required to grant such petition to the extent necessary to avoid those conditions specified under §251(f)(2) of the Act.<sup>104</sup>

Kentucky ALLTEL is specifically seeking suspension of any requirement to provide ULS and transport as requested by SETel and any potential requirement to offer any UNEs at rates below the interim rates that were established for Verizon South, Inc. ("Verizon") and that are presently in effect for Kentucky ALLTEL.<sup>105</sup> Kentucky ALLTEL is not seeking a blanket suspension of all §251(b) and §251(c) obligations and is therefore not seeking to keep competition out of its territory.<sup>106</sup> Quite the contrary, SETel and other CLECs would continue to have access to other UNEs, including loops, access to collocation, resale discounts, number

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<sup>103</sup> 47 U.S.C. §251(f).

<sup>104</sup> Steve Mowery Direct Testimony at page 7, lines 1–4.

<sup>105</sup> *Id.* at page 10, lines 1–4.

<sup>106</sup> Transcript at page 133.

porting and other requirements imposed on ILECs and would still have the ability to continue to compete with Kentucky ALLTEL on all of those bases, just not UNE-P.<sup>107</sup>

Kentucky ALLTEL has requested such suspension or modification because SETel's requests in connection with the arbitration issues presented in this case (1) would impose a significant economic burden on users of telecommunications services generally; (2) would impose requirements that are unduly economically burdensome; and (3) are not consistent with the public interest.<sup>108</sup> For example, as demonstrated by Kentucky ALLTEL witness, Steve Mowery, SETel's request for UNE-P, even at the interim rates established for Verizon, would lead to significant local rate increases for Kentucky ALLTEL's remaining subscribers. Further, requiring Kentucky ALLTEL to provision UNE-P at rates below the interim rates would lead to even larger rate increases for Kentucky ALLTEL's remaining subscribers.<sup>109</sup>

Kentucky ALLTEL has not negotiated with or provisioned ULS, unbundled transport or UNE-P to any carrier in Kentucky because of the Act's necessary and impairment standards, the D.C. Circuit Court's vacation of the FCC's UNE rules, and the adverse economic consequences that will result to Kentucky ALLTEL and its end users. If Kentucky ALLTEL is required to provision UNE-P to SETel, it will be the first provision by Kentucky ALLTEL of UNE-P and most significantly, any other carrier can opt in to the resulting interconnection agreement and provide service to end users over Kentucky ALLTEL's network through UNE-P. Because UNE-P prices, even at Verizon's interim rates, are significantly below Kentucky ALLTEL's retail prices, a significant demand would exist for UNE-P from Kentucky ALLTEL, which would result in a large revenue loss to Kentucky ALLTEL. As Kentucky ALLTEL demonstrated and as was unrefuted by SETel or Staff, such

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<sup>107</sup> Steve Mowery Direct Testimony at page 10, lines 6-10.

<sup>108</sup> *Id.* at page 10, lines 15-19.

losses would require increased rates for Kentucky ALLTEL's remaining retail customers and deprive Kentucky ALLTEL of the ability to maintain universal service or alternatively would require Kentucky ALLTEL to undertake drastic expense reductions that would result in the elimination of jobs, lost network improvements, and reduced service quality.<sup>110</sup>

These conclusions are supported by the actual UNE-P penetration experience and trends in the telecommunications industry. Additionally, Kentucky ALLTEL's analysis and conclusions are the same conclusions reached by Merrill Lynch when it analyzed the RBOC industry in its September 2002 report entitled, *The Telecommunicator*.<sup>111</sup> On a composite basis, RBOC penetration rates have grown from 2.62 percent in the first quarter of 2001 to 9.95 percent by the second quarter of 2003. This growth rate means a 24.4 percent penetration rate by the end of 2005. Mr. Mowery's analysis indicates that at the Verizon UNE rates Kentucky ALLTEL would experience a UNE-P penetration rate of 21.82 percent for Kentucky ALLTEL, slightly below the 24.4 percent rate of the RBOCs.<sup>112</sup> There is no reason to think that Kentucky ALLTEL would not see this same level of UNE-P penetration and in fact, it could be greater.<sup>113</sup> It follows, of course, that UNE-P penetration would be much greater at the lower rates requested by SETel.

Technically, UNE-P requires nothing more from the CLEC than does resale. Kentucky ALLTEL presently has over twenty active resellers in its territory with over 5,400 lines being resold. These resellers would very likely demand conversion to UNE-P.<sup>114</sup> Additionally, there are presently at least five CLECs (i.e., AT&T Communications, US LEC,

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<sup>109</sup> Steve Mowery Direct Testimony at page 10-11, lines 24-26 and 1-2.

<sup>110</sup> *Id.* at page 11, lines 7-22. *See also*, Transcript at pages 118-120.

<sup>111</sup> *See*, Steve Mowery Direct Testimony at page 12, beginning line 1. Kentucky ALLTEL Supplemental Data Request Exhibit 6.

<sup>112</sup> Steve Mowery Direct Testimony at page 14, lines 6-8.

<sup>113</sup> *Id.* at page 14, line 13.

<sup>114</sup> *Id.* at page 14, lines 14-15.

Lightyear Communications, MCI, and Sprint) that are demanding ULS from Kentucky ALLTEL for the purpose of obtaining UNE-P. Three of these CLECs have national footprints, and US LEC and Sprint have provided Kentucky ALLTEL with a *bona fide* request ("BFR") with respect to UNE-P.<sup>115</sup> Additionally, AT&T Communications announced on November 4, 2003, that it will now enter the local market in Kentucky, and MCI, a principal exploiter of UNE-P, is about to emerge virtually debt free from bankruptcy. In other words, the demand for UNE-P from Kentucky ALLTEL by CLECs who desire to provide the *MCI Neighborhood* type pricing plans without investing in any network facilities will be as great as, if not greater than, that experienced by the RBOCs. The impact on a carrier such as Kentucky ALLTEL can be much more significant than an RBOC at an early stage, since, unlike the RBOCs, companies such as Kentucky ALLTEL are dependent on fewer customers to generate more of their cost recovery. Therefore, the impact of conversion of fewer large customers to UNE-P pricing can be more significant much sooner than for an RBOC.<sup>116</sup>

As reflected in Table 3 in Steve Mowery's Direct Testimony, the difference between Kentucky ALLTEL's average revenues per line and Verizon's UNE-P rates is 47.7% in Zone 1, 37.8% in Zone 2, and 30.4% in Zone 3.<sup>117</sup> Applying these spreads to the penetration projections described in Table 1 in Steve Mowery's Direct Testimony would mean UNE-P penetration rates in Kentucky ALLTEL's service area of 27% in Zone 1, 17% in Zone 2, and 10% in Zone 3.<sup>118</sup> If required to provision UNE-P with the former Verizon rates, therefore, Kentucky ALLTEL would experience an annual revenue loss of over \$29 million, or over \$72

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<sup>115</sup> Jimmy Dolan Direct Testimony at page 10, lines 9-11. Transcript pages 198-199.

<sup>116</sup> Steve Mowery Direct Testimony at page 14, lines 17-25 and page 15, lines 1-2. See also, Transcript at pages 102-103, 123-124, and 127-129.

<sup>117</sup> Steve Mowery Direct Testimony at page 15.

<sup>118</sup> *Id.* at page 15, lines 9-11.

per remaining access line.<sup>119</sup> However, if the UNE rates requested by SETel in this proceeding were required, then the loss exceeds \$65 million, or \$178 per remaining access line annually.<sup>120</sup>

The annual loss per remaining access line would be \$72.13 at the Verizon UNE rates and \$178.42 at the SETel requested UNE rates.<sup>121</sup> As demonstrated by Mr. Mowery, per-line losses would amount to more than \$6.00 per month at the Verizon interim UNE rates and \$14.83 per month at the SETel requested UNE rates, but only residential prices could be expected to absorb the revenue losses caused by UNE-P. Because the average required monthly increase per line would be between \$6.02 and \$14.83 and because Kentucky ALLTEL would need to confine its recovery of these losses to residential lines, the actual per line monthly residential increase would be even more than the \$6.02 to \$14.83 per line shortfall referenced above.<sup>122</sup>

It was undisputed in this proceeding that as Kentucky ALLTEL's revenues are lost and its earnings eroded, Kentucky ALLTEL's property would be confiscated and it would be forced to (1) file for price increases or (2) cut expenses, eliminate jobs and reduce services or (3) do both. These outcomes would greatly, directly, and adversely affect Kentucky ALLTEL's ability and incentives to continue to invest in its Kentucky network and would place in jeopardy deployment of the resources necessary to continue to provide basic and advanced services to meet service standards and to maintain jobs. Any of these scenarios would destroy Kentucky ALLTEL's ability to maintain universal service.<sup>123</sup>

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<sup>119</sup> Steve Mowery Direct Testimony at page 16, lines 9-11.

<sup>120</sup> Transcript at pages 99, 102-103, and 140-141.

<sup>121</sup> Steve Mowery Direct Testimony at page 16, line 23. Transcript at page 102.

<sup>122</sup> Steve Mowery Direct Testimony at Table 4 and page 20, lines 3-16.

<sup>123</sup> *Id.* at page 18, lines 11-19. Transcript at pages 118-120.



Kentucky ALLTEL's rate of return is already below the last authorized reasonable return, and UNE-P will result in a drastic decline in that return. When Kentucky ALLTEL acquired the Verizon properties, the Commission examined the rate of return of these properties and, in the order approving Kentucky ALLTEL's acquisition, expressly found that the rates were just and reasonable at that time.<sup>124</sup> Subsequent to the Verizon acquisition, Kentucky ALLTEL has not increased any rates but has invested over \$113 million in improving these properties since August 1, 2002.<sup>125</sup> Additionally, subsequent to Kentucky ALLTEL's acquisition of the properties from Verizon in August, 2002, Kentucky ALLTEL has experienced a loss of 7% of its access lines in Lexington, 9% of its access lines in Elizabethtown, 19% of its access lines in Glasgow, and 52% of its access lines in Scottsville. These line losses and associated revenue losses have occurred without the provisioning of UNE-P by Kentucky ALLTEL and will continue to limit or prevent any opportunity for earnings growth in the foreseeable future.<sup>126</sup> Kentucky ALLTEL's earnings report (on file with the Commission) with respect to the eleven-month period ending June 30, 2003 reflects a return on equity of 7.94%, which is already below the last rate of return authorized by this Commission.<sup>127</sup> Although ALLTEL is presently attempting to adjust its expenses as a result of this deficit return and adjust pricing to respond to competition, further loss in revenues of \$29 million to \$65 million per year due to UNE-P will result in negative returns to Kentucky ALLTEL or significant increases to end user rates.<sup>128</sup>

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<sup>124</sup> Order at page 8, *In the Matter of Petition by ALLTEL Corporation [sic] to Acquire the Kentucky Assets of Verizon South, Incorporated*, Administrative Case No. 2001-00399 (February 13, 2002). (This proceeding may be referred to herein as the "Verizon acquisition case.")

<sup>125</sup> Steve Mowery Direct Testimony at page 19, lines 13-14.

<sup>126</sup> *Id.* at page 19, lines 18-24.

<sup>127</sup> *Id.* at page 18, lines 23-25 and page 19, lines 1-2.

<sup>128</sup> *Id.* at page 16, lines 9-11. Transcript at page 99.

As evidenced herein, requiring Kentucky ALLTEL to provision UNE-P as requested by SETel would not serve the public interest as it would result in a significant adverse impact on Kentucky ALLTEL's remaining customers because of the need to significantly increase local rates that would result from such a requirement. Even if no other mechanism was economically available to SETel to switch or transport local traffic, the negative impact on Kentucky ALLTEL's remaining customers would clearly and significantly outweigh any possible public benefit resulting from SETel's provision of service to customers over Kentucky ALLTEL's network through UNE-P.<sup>129</sup> Further, as the witnesses for Kentucky ALLTEL and even SETel have established that there are economically viable alternatives available to SETel for switching and transport, SETel can enter the greater Lexington market without requiring Kentucky ALLTEL to provision UNE-P. Because of the harm to Kentucky ALLTEL's remaining customers and network, any requirement for Kentucky ALLTEL to provision UNE-P would result in a significant adverse economic impact on Kentucky ALLTEL and its remaining customers without providing any real benefit to the public. The public cost significantly outweighs any possible public benefit that could be associated with Kentucky ALLTEL's provisioning of UNE-P, transport or further reductions in UNE rates.<sup>130</sup>

Kentucky ALLTEL has not relinquished and this Commission has not revoked Kentucky ALLTEL's statutory right to petition the Commission for a §251(f)(2) exemption under the Act. In the Verizon acquisition case, Kentucky ALLTEL responded to data requests from Staff regarding rural exemptions and clearly indicated in those responses that while Kentucky ALLTEL did not plan to seek a blanket exemption at that time under §251(f), it did reserve the right to seek from the Commission a suspension or modification of specific

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<sup>129</sup> Steve Mowery Direct Testimony at page 20, lines 21-25 and page 21, lines 1-3.

<sup>130</sup> *Id.* at page 21, lines 3-12.

interconnection modifications under §251(f)(2) of the Act.<sup>131</sup> A similar response was provided on behalf of Kentucky ALLTEL to a question from Staff under cross-examination at the hearing in the Verizon acquisition case.<sup>132</sup> During the proceeding in the Verizon acquisition case, Staff and certain CLECs attempted to insist that Kentucky ALLTEL should somehow relinquish its statutory right to seek a suspension or modification of interconnection requirements. Kentucky ALLTEL refused, as it must, and explained that it did not foresee seeking such for any then existing services and arrangements being utilized by CLECs. Consistent with that indication, Kentucky ALLTEL continues to offer the Verizon UNE rates and unbundled elements that were being utilized by CLECs at the time of the Verizon acquisition proceeding. As Mr. Mowery explained in this current proceeding, Kentucky ALLTEL is not presently seeking a suspension or modification of any of such requirements.<sup>133</sup>

The Commission's Approval Order in the Verizon acquisition case addressed this issue on pages 17 and 18 and found as follows:

The Commission acknowledges that ALLTEL meets the federal standards to qualify for the rural suspension or modification available pursuant to Section 251(f)(2) of the 1996 Telecommunications Act to companies that operate fewer than 2 percent of the nation's access lines. ALLTEL recognizes that it would have to petition this Commission for approval before asserting this suspension or modification. However, ALLTEL does not presently anticipate the need to assert any suspension or modification. (Emphasis added.)

Kentucky ALLTEL cannot relinquish nor can this Commission revoke Kentucky ALLTEL's §251(f)(2) right to petition the Commission for a fewer than two percent

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<sup>131</sup> See, Steve Mowery Direct Testimony at Attachment 1. See also, Transcript at pages 98-100.

<sup>132</sup> See, Transcript at pages 104-105.

<sup>133</sup> Transcript at pages 96-100.

suspension or modification. The right to petition for §251(f)(2) suspension or modification is a statutory right under the Act, and because the Act does not provide any mechanism for relinquishing such right or for revoking such right, Kentucky ALLTEL could not waive such right nor could the state commission revoke or should it revoke the right of a carrier to petition for a §251(f)(2) suspension or modification.<sup>134</sup> Either result would be inappropriate. For instance, neither a company nor a state commission could possibly anticipate all potential circumstances that might arise that would require a suspension or modification in order to fulfill the responsibility of the state commission under §251(f)(2) to avoid (1) a significant adverse economic impact on users of telecommunications services generally; (2) imposing a requirement that is unduly economically burdensome; or (3) a requirement that is technically infeasible, and certainly not where necessary to protect the public interest, convenience and necessity.<sup>135</sup>

The Act clearly included §251(f)(2) not only to provide protection to fewer than two percent rural carriers but to protect users of telecommunications services. Because this Commission has a responsibility under the Act to ensure that the conditions specified under §251(f)(2)(A) are avoided, it would not be appropriate, even if it were legally possible, for it to revoke such rights or to permit a carrier to permanently waive such rights. To do so would prevent the Commission from carrying out its responsibility under the Act to grant such suspensions or modifications necessary to avoid the conditions specified under §251(f)(2)(A), including, but not limited to, protecting end users.<sup>136</sup>

Consistent with the evidence above, Kentucky ALLTEL has petitioned the Commission for a suspension of its obligations under the Act to provision unbundled

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<sup>134</sup> Steve Mowery Direct Testimony at page 8, lines 27-30 and page 9, lines 1-2.

<sup>135</sup> Steve Mowery Direct Testimony at page 9, lines 4-11.

transport and ULS to SETel and to provide UNEs to SETel at rates even lower than Kentucky ALLTEL's existing UNE rates. Kentucky ALLTEL is clearly qualified to petition the Commission for these suspensions under §251(f)(2) of the Act as it serves less than two percent of the nation's access lines, and the suspensions clearly must be granted because such suspension is necessary to avoid the conditions specified in §251(f)(2)(A) of the Act. The requested suspension is necessary (1) to avoid a significant adverse economic impact on users of telecommunications services generally; (2) to avoid imposing a requirement that is unduly economically burdensome; and (3) as such suspension is consistent with the public interest, convenience, and necessity. The Act in §251(f)(2) requires the state commission to grant a petition that meets these requirements.<sup>137</sup> Thus, it has been demonstrated by clear and convincing (and unrefuted) testimony that the Commission should suspend any ULS and unbundled transport obligations and any requirement to further reduce UNE rates on the part of Kentucky ALLTEL pursuant to §251(f)(2) of the Act.

#### **IV. ISP TRAFFIC MUST BE EXCHANGED ON A BILL-AND-KEEP BASIS**

The appropriate reciprocal compensation rate for ISP-bound traffic is \$0.00, or in other words, a bill-and-keep arrangement must be used. The FCC determined that ISP-bound traffic should be exchanged on a bill-and-keep basis. Although the FCC adopted a phase-down approach for companies that had existing interconnection agreements at the time it issued its ISP Order,<sup>138</sup> it held that other companies without such agreements should proceed

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<sup>136</sup> Steve Mowery Direct Testimony at page 9, lines 13-21.

<sup>137</sup> *Id.* at page 21, lines 16-25 and page 22, lines 1-2.

<sup>138</sup> Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98) and *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68), (Rel. April 27, 2001) ("ISP Order").

directly to a bill-and-keep arrangement.<sup>139</sup> As Kentucky ALLTEL and SETel do not have an existing interconnection agreement, the phase-down scenario is not applicable in this proceeding. In any event, however, the FCC determined that the ultimate result for all carriers should be bill-and-keep.

Specifically, the FCC determined in its ISP Order that exchanging ISP-bound traffic on a bill-and-keep basis was more economically efficient than recovering those costs from the originating carrier. In that same ISP Order, the FCC held that carriers not exchanging traffic pursuant to an interconnection agreement at the time the ISP Order was adopted must exchange ISP traffic on a bill-and-keep basis. In particular, the FCC said:

Finally, a different rule applies in the case where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served.) In such a case, as of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period.<sup>140</sup>

The interim period to which the FCC refers represents the thirty-six month period it established during which carriers that had agreements providing for compensation for ISP traffic and that were exchanging such traffic would transition toward a complete bill-and-keep recovery mechanism. This interim period, which expires on June 15, 2004, was inapplicable even at its issuance as to those carriers that did not have an interconnection agreement and were not exchanging traffic. Because the interim phase-down period expires on June 15, 2004, even if Kentucky ALLTEL and SETel had had an agreement and had exchanged traffic on other than a bill-and-keep basis, which they have not, such is now virtually moot or will be as of June 15, 2004. Nonetheless, the FCC concluded that a bill-and-keep arrangement was

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<sup>139</sup> ISP Order at ¶ 81.

the appropriate regime under which to exchange ISP-bound traffic, regardless of whether carriers proceeded directly to that regime or transitioned there over a period of time.<sup>141</sup>

The FCC adopted the ISP Order on April 18, 2001. Kentucky ALLTEL did not have an interconnection agreement, nor did it exchange ISP-bound traffic with SETel on or prior to the date the FCC adopted the ISP Order.<sup>142</sup> In fact, SETel did not exchange and compensate with respect to ISP-bound traffic with Verizon's predecessor, GTE South Incorporated ("GTE"). Pursuant to the SETel-GTE agreement which, as noted by SETel's counsel at the hearing, is on file with the Commission and a matter of public record,<sup>143</sup> SETel's ISP-bound traffic was subject to bill-and-keep and exempt from reciprocal compensation. Specifically, Section 1.57 of the SETel-GTE agreement exempted from the definition of local traffic ISP traffic and stated as follows:

Local Traffic – traffic that is originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current local serving area, including mandatory local calling scope arrangements...[but] does not include optional local calling scopes...Local Traffic excludes Information Service Provider (ISP) traffic (e.g., Internet, 900-976, etc.).<sup>144</sup>

Therefore, this Commission must conclude, as it is also undisputed by SETel, that the FCC established in clear and unambiguous terms that a bill-and-keep regime is the appropriate method for exchanging ISP-bound traffic. Furthermore, as the FCC found that carriers which were not exchanging traffic pursuant to an interconnection agreement prior to April 18, 2001 were to immediately adopt a bill-and-keep methodology and as the parties here did not have an interconnection agreement prior to April 18, 2001, this Commission must

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<sup>140</sup> ISP Order at ¶ 81.

<sup>141</sup> ISP Order at ¶78. Cesar Caballero Direct Testimony at page 4, lines 20-29 and page 5, lines 2-3.

<sup>142</sup> Cesar Caballero Direct Testimony at page 5, lines 10-12.

<sup>143</sup> Transcript at page 179.

<sup>144</sup> SETel-GTE Interconnection Agreement at page II-5.

approve a bill-and-keep regime with respect to ISP-bound traffic exchanged between SETel and Kentucky ALLTEL. Section 69.3.2 of Kentucky ALLTEL's proposed interconnection agreement (or last best offer) complies with the FCC's directive in the ISP Order and provides that the exchange of ISP-bound traffic shall not be governed by reciprocal compensation.

V. **THE VERIZON UNE RATES AND RESALE DISCOUNT REFLECTED ON THE PRICING ATTACHMENT TO KENTUCKY ALLTEL'S LAST BEST OFFER ARE THE APPROPRIATE KENTUCKY ALLTEL UNE RATES UNLESS OR UNTIL CHANGED IN THE GENERIC UNE PROCEEDING.**

Kentucky ALLTEL is offering to provide SETel the UNE rates that its predecessor and prior owner of the assets in question (i.e., Verizon) had in place.<sup>145</sup> These are also the same rates that CLECs were paying prior to Kentucky ALLTEL's acquisition of the properties and are paying today.<sup>146</sup>

During the Verizon acquisition case, Kentucky ALLTEL, subject to reserving its two percent petition, agreed to adopt Verizon's UNE rates until such time as Kentucky ALLTEL specific costs and rates could be established. In the Order approving the Verizon acquisition, the Commission required Kentucky ALLTEL to meet with Staff to discuss the establishment of UNE rates for Kentucky ALLTEL. Specifically, the Commission required Kentucky ALLTEL to file UNE rates in the format specified by the Commission in Administrative Case No. 382 ("the generic UNE proceeding") by no later than September 5, 2002. Staff was also directed to schedule an informal conference to begin discussions about Verizon's UNE rates and the appropriateness of those rates with respect to Kentucky ALLTEL's customers.<sup>147</sup>

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<sup>145</sup> See, Attachment 8 of Appendix A ("Pricing Attachment") to Kentucky ALLTEL's Last Best Offer filed with the Commission on November 10, 2003.

<sup>146</sup> Cesar Caballero Direct Testimony at page 6, lines 12-15.

<sup>147</sup> Cesar Caballero Direct Testimony at page 7, lines 12-19. Order approving Verizon acquisition at page 18.



While Kentucky ALLTEL filed, subject to a petition for confidential treatment, a forward-looking cost study in the generic UNE proceeding on November 7, 2002 which was prepared in the manner requested by Staff, Kentucky ALLTEL has not proposed and will not propose that cost study for approval. Furthermore, on November 7, 2003 in the generic UNE proceeding, the Commission released an order requiring Kentucky ALLTEL to file costs studies and proposed UNE rates within thirty days (which time has now been extended by subsequent order). The Commission will, therefore, have an opportunity to evaluate and make a recommendation as to the appropriateness of Kentucky ALLTEL's proposed UNE rates.

Changes in the rates based on an updated cost study are appropriate because there have been recent changes to the total element long-run incremental cost ("TELRIC") rules, and additional changes are imminent. The TRO made modifications to many of the components driving TELRIC, and the FCC has also initiated a notice of proposed rulemaking ("NPRM") which seeks comments on additional modifications to TELRIC. In the TRO, the FCC has changed the parameters associated with the cost of capital and depreciation, which more precisely reflect competitive conditions. These two changes alone significantly impact UNE rates. Additionally, Kentucky ALLTEL's UNE cost study will be revised in order to reflect the appropriate Kentucky ALLTEL specific costs.<sup>148</sup>

Unless or until such time as the Commission approves rates that are specific to and appropriate for Kentucky ALLTEL, Verizon's previously approved interim UNE rates are the only appropriate rates. Verizon's UNE rates are the only appropriate current rates because they were prepared using the forward-looking costs of the properties now owned and operated

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<sup>148</sup> Cesar Caballero Direct Testimony at page 8, lines 10-17.

by Kentucky ALLTEL. The Verizon rates were previously approved by the Commission and are utilized by other CLECs operating in what is now Kentucky ALLTEL's service area.<sup>149</sup>

Under no circumstances could BellSouth's UNE rates or any other arbitrarily chosen rates such as those requested by SETel be considered applicable to Kentucky ALLTEL. BellSouth designed its UNE rates using the forward-looking costs of designing a network for its Kentucky properties. Therefore, the costs supporting BellSouth's rates are confined solely to its properties, and BellSouth's costs are not at all representative of Kentucky ALLTEL's properties or costs. The Verizon UNE rates, however, are a better interim measure as they were prepared based on TELRIC for the same properties now operated by Kentucky ALLTEL.<sup>150</sup>

SETel provided no evidence in this proceeding to justify a different conclusion from that advocated by Kentucky ALLTEL.<sup>151</sup> However, SETel's witness testified that he is not familiar with FCC's TELRIC methodology and, in spite of Staff's repeated attempts to elicit more, that the rates SETel is seeking are merely "somewhere between" the Verizon rates and the BellSouth rates.<sup>152</sup> In fact, the SETel witness further indicated that he does not even know if the Verizon rates offered by Kentucky ALLTEL are cost based or not.<sup>153</sup>

Thus, given the evidence put forth by Kentucky ALLTEL with respect to pricing and the inability of SETel to support its proposed pricing, the Commission should confirm its prior approval of the Verizon UNE rates for use in the Kentucky ALLTEL service area until such time as the Commission has an opportunity to complete its investigation of Kentucky

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<sup>149</sup> Cesar Caballero Direct Testimony at page 8, lines 22-25 and page 9, lines 2-4.

<sup>150</sup> *Id.* at page 9, lines 6-13.

<sup>151</sup> *See*, Brad Hall Direct Testimony.

<sup>152</sup> Transcript at pages 25-28.

<sup>153</sup> *Id.* at page 26.

ALLTEL's costs and UNE rates in the generic UNE proceeding and to establish therein final UNE rates consistent with the TRO and the UNE NPRM.<sup>154</sup>

Once Kentucky ALLTEL specific UNE rates are approved by the Commission in the generic UNE proceeding, any rate change should be implemented on a prospective basis only. Therefore, the risks of potential rate increases are shared equally among the parties. Moreover, booking and reserving such true-ups is administratively burdensome and causes anti-competitive concerns given that other CLECs in what is now Kentucky ALLTEL's territory are utilizing the Verizon UNE rates.<sup>155</sup>

Similar to interim UNE rates, Kentucky ALLTEL is proposing to offer to SETel on an interim basis the Commission approved resale discount that Verizon provided prior to Kentucky ALLTEL's acquisition of the properties and that other competitive resellers are currently receiving. The Commission should adopt Verizon's resale discount until such time as it completes its generic investigation into Kentucky ALLTEL's costs. Again, while Kentucky ALLTEL has filed its specific costs with Staff, including an avoided cost study as directed by Staff, Kentucky ALLTEL will file an avoided cost study consistent with FCC requirements as outlined above and to comply with the TRO. Only after the Commission has had an opportunity to review Kentucky ALLTEL's cost study and has conducted the necessary proceeding, can it establish a permanent, prospective, and appropriate resale discount for Kentucky ALLTEL.<sup>156</sup>

To conclude, the evidence presented by Kentucky ALLTEL in this proceeding with respect to the appropriate compensation for ISP-bound traffic and the effective Verizon UNE rates and resale discount to be charged pending establishment of Kentucky ALLTEL specific

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<sup>154</sup> See, Cesar Caballero Direct Testimony at page 9, lines 18-21.

<sup>155</sup> Cesar Caballero Direct Testimony at page 10, lines 5-11.

rates is unrefuted or has not been disproved by SETel. Thus, consistent with the record herein, the Commission should find that the appropriate reciprocal compensation rate for ISP-bound traffic is \$0.00 and that the Verizon UNE rates and resale discount should be adopted in the interim until such time as the Commission completes its investigation with respect to Kentucky ALLTEL rates in the generic UNE proceeding.

**VI. WITH RESPECT TO ANY KENTUCKY ALLTEL END OFFICE FOR WHICH SETEL USAGE EXCEEDS A DS1 CAPACITY, SETEL, SHALL, CONSISTENT WITH INDUSTRY PRACTICE AND ITS INTERCONNECTION AGREEMENT WITH BELL SOUTH, BE REQUIRED TO OBTAIN OR INSTALL DIRECT TRUNKS (ARBITRATION ISSUE NO. 12).**

Despite SETel's assertion that a DS3 threshold capacity is appropriate, industry practice and SETel's own interconnection agreement with BellSouth demonstrate that SETel should be required to obtain or install direct trunks to any Kentucky ALLTEL end office for which SETel's usage exceeds a DS1 capacity. Although SETel representative, Liz Thacker, was allowed to present live direct testimony on this issue at the hearing, SETel did not prefile any direct testimony on this issue and did not present Ms. Thacker for cross examination on the issue.<sup>157</sup> Thus, as Ms. Thacker's statements at the hearing cannot be verified and should not be considered as they are improper and as SETel otherwise presented no evidence on this issue, Kentucky ALLTEL's position with respect to this issue should be upheld.

In a December 22, 2000 decision of the New York Public Service Commission ("New York Commission") it determined that a DS1 capacity threshold is representative of the

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<sup>156</sup> Cesar Caballero Direct Testimony at page 10, lines 15-25 and page 11, lines 1-6.

<sup>157</sup> Transcript at page 18.

industry standard.<sup>158</sup> In response to ILEC concerns that facilities could become overloaded and that additional costs would be incurred to reinforce the network, the New York Commission determined that if call volumes between an ILEC and CLEC exceed a small volume level, then the CLEC should be responsible for establishing direct trunking. Specifically, the New York Commission stated that a “DS-1 or T-1 level (24 voice grade channels)...is a reasonable standard for triggering dedicated transport since it represents a standard unit of network capacity, is an efficient network design, and is generally acceptable to most parties.”<sup>159</sup> Consistent with this industry standard, Kentucky ALLTEL has received CLEC orders for UNE loops, all of which are at the DS0 or DS1 level.<sup>160</sup>

Interestingly, SETel has accepted a DS1 capacity threshold in its interconnection agreement with BellSouth which is on file with this Commission and a part of the public record.<sup>161</sup> In Attachment 3 of the SETel-BellSouth interconnection agreement, Section 2.18 provides for direct end-office-to-end-office interconnection, and subsection 2.18.2 states that the parties shall utilize direct end-office-to-end-office trunk groups under certain conditions. One of those conditions, as set forth in subsection 2.18.4, is traffic volume. In particular, SETel agreed to the following:

Either Party will install additional capacity between such points when overflow traffic between [SETel’s] switching center and BellSouth’s end office exceeds or is forecasted to exceed a single DS1 of traffic per month. In the case of one way trunking, additional trunking shall only be required by the Party whose trunking has achieved the preceding usage threshold.<sup>162</sup>

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<sup>158</sup> See, Order Establishing Requirements for the Exchange of Local Traffic, *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies*, Case 00-C-0789 (Dec. 22, 2000).

<sup>159</sup> *Id.* at page 7.

<sup>160</sup> Jimmy Dolan Direct Testimony at page 8, lines 25-26.

<sup>161</sup> See, SETel-BellSouth Interconnection Agreement on file at [www.puc.ky.gov/sitemap.htm#ui](http://www.puc.ky.gov/sitemap.htm#ui).

<sup>162</sup> *Id.* at Attachment 3, Section 2.18, page 239.

Kentucky ALLTEL provided SETel similar terms and conditions.<sup>163</sup> Specifically,

Section 64.2.4 of Kentucky ALLTEL's Last Best Offer provides as follows:

In the event that the volume of traffic between a [Kentucky ALLTEL] End Office and the [SETel] network, which is carried by a Final Tandem Interconnection Trunk group, exceeds the Centium Call Second (Hundred Call Second) busy hour equivalent of one (1) DS-1 at any time and/or 200,000 minutes of use for a single month: (a) if One-Way Interconnection Trunks are used, the originating Party shall promptly establish new End Office One-Way Interconnection Trunk groups between the [Kentucky ALLTEL] End Office and the [SETel] network; or (b) if Two-Way Interconnection Trunks are used, [SETel] shall promptly submit an ASR to [Kentucky ALLTEL] to establish new End Office Two-Way Interconnection Trunk group(s) between that [Kentucky ALLTEL] End Office and the [SETel] network.<sup>164</sup>

In conclusion, it is unrefuted that SETel should be required to obtain or install direct trunks to any Kentucky ALLTEL end office for which SETel's usage exceeds a DS1 capacity. Such a finding is consistent with standard industry practice and SETel's own interconnection agreement with BellSouth.

**VII. IF UNE-P COULD LAWFULLY BE REQUIRED OF KENTUCKY ALLTEL, WHICH THE EVIDENCE HAS SHOWN IT CANNOT, KENTUCKY ALLTEL MAY ASSESS SETEL CHARGES FOR USAGE ON UNE-P (ARBITRATION ISSUE NO. 16).**

Strangely, although this issue was withdrawn by SETel during the arbitration and was resolved, Staff proceeded and was allowed to elicit direct testimony with respect to this issue from SETel's witness, Brad Hall, again, in spite of the fact that Mr. Hall did not prefile direct testimony on the issue.<sup>165</sup> In light of Staff's continued interest in this issue, Kentucky ALLTEL, therefore, is compelled to brief this issue but does so without waiving its continued objection in this matter.

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<sup>163</sup> See, Jimmy Dolan Direct Testimony at page 8, lines 5-9.

<sup>164</sup> Kentucky ALLTEL's Last Best Offer at Attachment 3, Section 64.2.4, pages 49-50.

Kentucky ALLTEL should be permitted to assess a port charge that is usage based. Contrary to SETel's prior assertions, the Texas Public Utility Commission did not determine that such a charge must be flat-rated. SETel, in response to repeated requests by Kentucky ALLTEL, did not produce the citations on which it relied when it claimed that Texas determined that "there should be no port usage charge." SETel previously alleged that this charge is cost prohibitive if the customer is a heavy service user. However, such heavy traffic volumes were in fact what the Texas arbitrator used to justify application of usage charges on UNE-P.<sup>166</sup>

In deciding what is the appropriate rate structure for the ULS network element, Southwestern Bell argued that its local switching rates should continue to contain a minute of use ("MOU") component, while the competitive coalition argued for a flat-rated or per-port charge. The Texas arbitrator decided that ULS is composed of both a fixed charge for the line ports and a MOU component, which is appropriate when considering that the ULS is subject to the effects of increased usage of the switches. By way of example, the arbitrator noted that if multiple switches are deployed in a large exchange, the MOU inter-office trunking component may vary depending on the size of the exchange but cannot be captured readily on a flat-rate basis. A flat rate fails to fully capture the costs associated with multiple switches and risks overcharging customers in a smaller exchange to recover those costs.<sup>167</sup>

This Commission should find in favor of Kentucky ALLTEL with respect to its position on port usage charges as SETel withdrew this issue from the arbitration.

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<sup>165</sup> Brad Hall Direct Examination by Staff - Transcript at pages 42-43.

<sup>166</sup> Cesar Caballero Direct Testimony at page 11, lines 11-21. *See also*, Petition for Arbitration, *Petition of MCIMetro Access Transmission Services, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company under the Telecommunications Act of 1996*, PUC Docket No. 24542 (August 22, 2001).

<sup>167</sup> Cesar Caballero Direct Testimony at page 11, lines 21-25 and page 12, lines 1-10.

Notwithstanding that fact, the Commission should further find consistent with the Texas decision that if it were lawful to require Kentucky ALLTEL to provide UNE-P, then it would be appropriate for Kentucky ALLTEL to charge SETel for usage.

**VIII. KENTUCKY ALLTEL'S OBJECTIONS AND MOTIONS IN THE HEARING SHOULD HAVE BEEN SUSTAINED AND AS FAILURE TO DO SO RESULTED IN DENIAL OF DUE PROCESS, ANY DECISION IN THIS MATTER SHOULD BE ISSUED DISREGARDING THE PORTIONS OF THE LIVE TESTIMONY TO WHICH KENTUCKY ALLTEL OBJECTED.**

The Commission's procedural Order on October 27, 2003 required parties to prefile direct testimony and stated that unless special leave was granted all direct testimony shall be prefiled. SETel neither sought nor was granted special leave. Specifically, the Commission directed that, "All testimony at the formal hearing shall be offered pursuant to cross-examination or redirect examination, provided, however, that in light of the time constraint, rebuttal testimony will be permitted."<sup>168</sup> Although the Commission, as it acknowledges in the October 27 Order, may not be bound by the technical rules of legal evidence pursuant to K.R.S. §278.310,<sup>169</sup> it is still obligated to provide a fair, unbiased, and impartial tribunal.

In as much as Staff purports to represent the Commission, Staff is required to act in a non-arbitrary and impartial manner. In a recent decision not yet final, the Court of Appeals of Kentucky heard an appeal with respect to approval of a zoning map amendment by the Boone County Planning Commission.<sup>170</sup> The case involved claims that the Boone County Planning

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<sup>168</sup> October 27 Order at 2.

<sup>169</sup> K.R.S. §278.310 provides in its entirety, "All hearings and investigations before the commission...shall be governed by rules adopted by the commission, and in the conduct thereof neither the commission nor the commissioner shall be bound by the technical rules of legal evidence."

<sup>170</sup> See, *Hilltop Basic Resources, Inc., et. al. v. County of Boone and Boone County Fiscal Court*, Court of Appeals No. 2002-CA-001081-MR (Rendered October 10, 2003; To Be Published) ("Boone County Order").



Commission had acted arbitrarily, failed to make adequate findings of fact, and deprived the applicant of due process.<sup>171</sup> In particular dispute in the Boone County case were certain *ex parte* communications.<sup>172</sup> The focus of the Court of Appeals review was whether the action was arbitrary, *i.e.*, whether the basic elements of due process were afforded the parties. Due process encompasses effective notice, an opportunity to be heard, and an impartial and unbiased tribunal.<sup>173</sup> Despite the pressures of hearing matters involving sensitive or inflammatory issues of public interest, the Court of Appeals stated that an unbiased decision-maker is the critical component of fundamental fairness. Specifically, the Court of Appeals found, “The very perception that a decision-maker may have prematurely judged the issues taints the proceedings and erodes public confidence.”<sup>174</sup>

Failure to sustain Kentucky ALLTEL’s objections or to grant its motions denied Kentucky ALLTEL an impartial hearing and resulted instead in denial of due process to Kentucky ALLTEL in a variety of ways.<sup>175</sup> Staff, by its own admission, conducted *ex parte* communications with SETel with respect to Staff’s anticipated cross examination and deficiencies in SETel’s direct case.<sup>176</sup> Staff presented live direct testimony of an SETel witness, Wesley Maynard, who did not prefile any direct testimony. Further, parties were allowed to admit into evidence documents previously filed but for which no testimony was offered and about which Kentucky ALLTEL was not provided an opportunity to cross examine. By its conduct in this proceeding, Staff demonstrated its bias and predetermination

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<sup>171</sup> Boone County Order at page 5.

<sup>172</sup> Boone County Order at page 8.

<sup>173</sup> *Id.* at page 6.

<sup>174</sup> *Id.* at page 7.

<sup>175</sup> Additionally, Kentucky ALLTEL’s Discovery requests were denied in part despite the fact that the Commission determined impairment to be relevant to this proceeding. (November 3 Order at 4.)

<sup>176</sup> Transcript at pages 13-14.

of the issues in this matter (and in so doing risked appearing to express the same on behalf of the Commission), with the result being that this proceeding was not impartially conducted.

As a result of the informal conference, discovery questioned propounded to SETel, and the Commission's November 3 Order, all parties were well aware that impairment and particularly the SETel switch, was a key unresolved issue in this proceeding. SETel chose not to prefile any direct testimony with respect to impairment including its switch location, capabilities, and upgrade ability. Contrary to the express terms of the November 3 Order, SETel indicated that it did not consider this switch information "to be a huge issue" until after it received Kentucky ALLTEL's prefiled testimony<sup>177</sup> and until Staff contacted SETel asking it to supply a witness regarding the switch. SETel also stated that it believed it had produced everything insofar as the record was concerned through its statement of resolved and unresolved issues, Mr. Hall's testimony on pricing, and its discovery responses.<sup>178</sup> Although SETel had decided to only prefile direct testimony with respect to pricing, Staff engaged in communications with SETel without any notice to Kentucky ALLTEL.<sup>179</sup> As the Commission acknowledged, SETel should have prefiled testimony and not doing so was a "sandbag."<sup>180</sup> Notwithstanding this, Staff was allowed to call Mr. Maynard to the stand so that Staff could then elicit direct and rebuttal testimony from him with respect to the SETel switch. And, while Kentucky ALLTEL prefiled extensive testimony on this issue in full compliance with the Commission's October 27 and November 3 Orders, in spite of Staff's keen interest in the SETel's switch, Staff did not ask Kentucky ALLTEL's witness a single cross examination question with respect to his direct prefiled testimony.

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<sup>177</sup> Transcript at page 17.

<sup>178</sup> *Id.* at pages 53-54.

<sup>179</sup> *Id.* at pages 13-14.

<sup>180</sup> *Id.* at pages 15-16.

In contrast, in "cross examining" Mr. Maynard, Staff asked Mr. Maynard leading questions in an attempt to provide an opportunity to establish a case for SETel. For example, Staff asked him, "So is it your testimony that the switch currently owned by SouthEast is not capable of providing services that SouthEast currently wants to provide?"<sup>181</sup> This exchange was obviously not "cross examination" but rather very obvious live direct, leading testimony intended to elicit information that SETel had chosen not to prefile but which Staff needed in order to support its predetermined view. Again despite Staff's assertion that it was merely trying to inquire into an issue that it did not understand,<sup>182</sup> Staff sought understanding only from one side, SETel. Staff did not cross Kentucky ALLTEL's witness, Mr. Wagner with respect to his extensive testimony.

Likewise, Staff asked SETel witness, Brad Hall, questions with respect to reciprocal compensation despite the fact that Mr. Hall did not address this issue in his direct testimony.<sup>183</sup> Upon the objection of Kentucky ALLTEL counsel, Staff asserted that while the issue of reciprocal compensation may not have been prefiled as testimony, SETel did include a position statement with respect to the issue.<sup>184</sup> Although Kentucky ALLTEL's objection was sustained for the reason that the issue was not in prefiled testimony, Staff was then permitted to ask the witness questions with respect to the issue.<sup>185</sup> Staff's questions to SETel witnesses again were merely direct examination that the interested party should have prefiled. For example, Staff's questions included: "What is the basis of SETel's position that transportation and termination of traffic rates be applied to Internet traffic?"<sup>186</sup> and "Do you have any practical consideration that would prevent SETel from entering the Kentucky ALLTEL

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<sup>181</sup> Transcript at page 60.

<sup>182</sup> *Id.* at page 41.

<sup>183</sup> *Id.* at page 36.

<sup>184</sup> *Id.* at page 36.

<sup>185</sup> *Id.* at page 38.

market if it does not receive unbundled switching or UNE-P?"<sup>187</sup> Staff was eliciting live direct testimony that was beyond the scope of SETel's prefiled direct.

As noted previously, Staff and SETel were allowed to proceed with offering the live direct testimony of Mr. Maynard with respect to issues that were mentioned in SETel's Statement of Resolved and Unresolved Issues and Discovery responses. However, such live testimony should have been precluded and should now be disregarded as the issue statements and Discovery responses are not evidence and are not prefiled direct testimony. To allow a party to make its case or to consider as testimony or evidence brief statements or responses in a discovery response or other pleading is improper and to then allow the party or Staff to present live direct testimony to expand upon those brief statements (also contrary in this case to the Commission's October 27 Order) severely prejudices the other party and results in a biased and arbitrary proceeding.

Further, although SETel concluded its case and passed its opportunity to present rebuttal testimony,<sup>188</sup> after a Kentucky ALLTEL witness was presented during rebuttal, SETel was allowed to recall a witness back to the stand for more live direct examination as what must be surrebuttal testimony with respect to SETel's switch and its capabilities. In overruling Kentucky ALLTEL's objection, the Commission noted that it would allow Mr. Maynard's testimony because it was "critical."<sup>189</sup> While Kentucky ALLTEL agrees the issue is critical, all parties, including SETel knew this issue was critical long before the deadline for filing prefiled direct testimony and yet, SETel chose not to put on a case with respect to these switching issues, and therefore, SETel and Staff should not have been allowed to do so after the deadline.

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<sup>186</sup> Transcript at page 39.

<sup>187</sup> *Id.* at page 45.

In short, Kentucky ALLTEL proved that SETel is not impaired with respect to local switching and transport. Kentucky ALLTEL presented its case with respect to this issue as well as all other issues that had been identified as being unresolved and Kentucky ALLTEL worked under the same time constraints in this expedited proceeding as did SETel, who chose to only address pricing in its prefiled testimony. The above actions at the hearing disadvantaged Kentucky ALLTEL and denied it due process of law. As a result, Kentucky ALLTEL renews its objections and motions with respect to the admission of SETel testimony and the manner in which the proceeding was conducted. The objectionable testimony and unsupported filed statements should be disregarded as Kentucky ALLTEL was denied due process and an impartial tribunal.

## **IX. CONCLUSION**

The evidence presented herein proves undoubtedly that SETel is not, by any number of standards, impaired with respect to local switching and transport. SETel is not a fledgling new entrant and itself confirmed that it has self provisioned a local service capable switch. Further, upgrades to SETel's switch have been shown to be readily available and economical. Even if for argument sake, SETel could be said to be impaired, the Commission must suspend any unbundled switching obligations and any further reductions in UNE rates as Kentucky ALLTEL has demonstrated, and as neither SETel nor Staff has refuted, that the criteria of §251(f)(2) of the Act have been satisfied.

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<sup>188</sup> Transcript at page 84.

<sup>189</sup> *Id.* at pages 213-214.

With respect to other issues raised in this matter, Kentucky ALLTEL has demonstrated that Verizon UNE rates and resale discount are the appropriate rates to be charged by Kentucky ALLTEL unless or until the Commission establishes Kentucky ALLTEL specific rates in the generic UNE proceeding. Additionally, the FCC's ISP Order requires that ISP traffic must be exchanged on a bill-and-keep basis, contrary to SETel's unsubstantiated claim that such traffic should be subjected to reciprocal compensation. Further, SETel should be required (consistent with industry practice and SETel's own interconnection agreement with BellSouth) to obtain or install direct trunks to any Kentucky ALLTEL end office with respect to which SETel usage exceeds a DS1 capacity threshold. Finally, even if UNE-P could lawfully be required of Kentucky ALLTEL, which the evidence has shown clearly that it cannot and should not, SETel should be assessed usage charges on UNE-P.

Kentucky ALLTEL filed in this matter in a timely fashion extensive direct testimony with respect to all of these issues and offered five witnesses for cross examination on the issues as well. SETel, however, chose not to make a case or submit prefiled direct testimony with respect to any of the identified issues except pricing. Yet, Staff and SETel were allowed at the hearing to introduce live direct testimony and engage in other various procedural infractions such as *ex parte* communications. The result was a biased proceeding and a denial of Kentucky ALLTEL's due process. To the extent that Kentucky ALLTEL was denied due process and access to an unbiased and impartial tribunal, the Commission may now remedy those procedural deficiencies by issuing a decision consistent with Kentucky ALLTEL's positions in this matter and without any deference to the evidence introduced improperly by SETel and Staff.